IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

JOHN H. GOETZE, APPELLANT,
v.
THE UNITED STATES.

No. 240. On appeal, etc.

FOURTEEN DIAMOND RINGS, MANUEL PEPER, CLAIMANT, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

No. 419. On writ of error.

BRIEF FOR THE UNITED STATES.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1900.

JOHN H. GOETZE, APPELLANT, v. THE UNITED STATES.

No. 340. On appeal, etc.

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BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASES.

On June 6, 1899, Goetze imported from Porto Rico into the port of New York a quantity of leaf or filler tobacco, upon which duty was assessed at 35 cents per pound as filler tobacco not specially provided for, in accordance with the provisions of paragraph 213 of the tariff act of 1897, commonly known as the "Dingley Act."

The importer protested, claiming that the merchandise was not subject to duty, because Porto Rico at the time of the importation was not a foreign country, and because, therefore, the imposition of duties on goods brought from a place within the territory of the United States into a port of the United States is not lawful and valid under the Constitution.

The Board of General Appraisers sustained the assessment of duty imposed by the collector upon the merchandise in question, and thereupon the importer appealed to the United States circuit court for the southern district of New York, by which court the decision of the Board of General Appraisers was affirmed in an opinion rendered by District Judge Townsend. From the judgment of the circuit court this appeal was taken.

Porto Rico was partially occupied by the war forces of the United States during the months of July and August, 1898. By the protocol of August 12, 1898, between the United States and Spain, Spain agreed to cede Porto Rico to the United States and immediately evacuate. The evacuation was effected and full possession of the island assumed by the United States prior to January 1, 1899. From that date until the 1st of May, 1900, Porto Rico was occupied and governed by the military forces of the United States, under the command of the President, as conquered territory, under the law of belligerent right.

The treaty of Paris, made in pursuance of the protocol, was signed December 10, 1898, ratified by the Senate February 6, 1899, and ratifications exchanged April 11, 1899. So that the importation in this case was subsequent to the ratification of the treaty, but prior to the establishment of a civil government in the island under act of Congress.

It does not appear that the importers are citizens of the United States or of Porto Rico, nor whether or not the imported tobacco was the product of Porto Rico.

In the case of Fourteen Diamond Rings, it appears that the claimant, Pepke, is a citizen of the United States and served as a United States soldier in the Island of Luzon; that while there he purchased or acquired the rings in question and brought them into the United States without paying duty thereon some time in the year 1899, between July 31 and September 25. The rings were seized, on May 18, 1900, at Chicago by a United States customs officer as merchandise liable to duty which should have been invoiced, and was fraudulently imported and brought into the United States contrary to law. An information for the forfeiture of the rings was filed on behalf of the Government June 1, 1900, to which the claimant pleaded, setting up that at the time he acquired said property Luzon was a part of the territory of the United States and that the seizure of said goods was contrary to the claimant's right as a citizen of the United States under the Constitution, and particularly under section 2, Article IV, thereof, and he insisted that under Article I, section 8, Congress is required in laying and collecting taxes to see to it that all taxes and duties shall be uniform throughout the United States. To this plea the United States demurred, and upon hearing of the demurrer, the district court gave judgment of forfeiture for the Government. This judgment the claimant has removed into this court by a writ of error.

ARGUMENT FOR THE UNITED STATES.

THE GOVERNMENT'S CONTENTION.

The tariff act of 1897 declares that "there shall be levied, collected, and paid upon all articles imported from foreign countries and mentioned in the schedules herein contained, the rates of duty which are by the schedules and paragraphs respectively prescribed." (*30 Stat., 151.*)

The Government contends, and the circuit court so held, that this act applied to merchandise imported from Porto Rico and the Philippine Islands after their cession to the United States exactly as it did before; that within the meaning of the act these countries are to be regarded as foreign, belonging to but not forming in a domestic sense a part of the United States.

That it is within the constitutional province of the treaty-making power to accept the cession of foreign territory upon such terms, conditions, and limitations as to its internal status as may best subserve the interests of the United States, and it is not necessary to invest such territory with the full status of an integral part of the Union.

That this is one of the ordinary and necessary sovereign powers of an independent nation, and nothing in the Federal Constitution or in the fundamental principles that underlie our Republic denies to the nation a right to the full exercise of this usual and common sovereign right.

That the treaty-making power—the President and the Senate—as evidenced by the language of the treaty of Paris, did not intend to make Porto Rico and the Philippine Islands integral parts of the United States, but intended, in several particulars, to reserve their final status for adjustment by Congress, at the same time making peculiar and special differential provisions for variations and exceptions in customs and port regulations as to Spain and Spanish goods and subjects, which are inconsistent with the intention that the ceded countries became upon the ratification of the treaty a part of the United States in all respects and in the fullest sense.

The Government contends that the term "foreign countries" in the act of 1897 is to be regarded as having been understood by Congress to be subject to the rule of interpretation of the phrase given by the Supreme Court in the case of *Fleming* v. *Page*, where it was held that under our revenue laws every port is regarded as a foreign one until expressly established as domestic under the authority and control of the statutes of the United States.

That the clause of the Constitution which declares that duties, imposts, and excises shall be uniform throughout the United States does not apply to nor govern these cases, because the term "United States," as there used, means only the territory comprised within the several States of the Union, and was intended only for their benefit and protection, and not for the benefit and protection of outside territory belonging to the nation: that in the latter sense duties on imports from these islands are uniform throughout the United States, because they are uniformly imposed at every port in the United States, so that there is no preference given to the ports of one State over those of another, nor is any inequality between the several States created.

That the right to bring merchandise into the United States is a right entirely within the regulation of Congress; such right in no wise differs as to either citizens or aliens. Citizenship carries with it no special or peculiar privileges at the custom-house. The American, the Spaniard, the Porto Rican, are treated alike. The basis of the customs laws is not ownership, but (1) the geographical origin of the shipment, and (2) the nature of the goods. The duty is imposed against merchandise, not upon the importer.

The Government contends, therefore, that in view of the fact that tariff laws are *in rem*, there is no principle of justice, much less of constitutional restriction, which forbids Congress from taxing in this way the merchandise of outlying possessions of the United States when brought into the ports of the Union. That the limitations of the Constitution as to customs, etc., were intended to secure equality between the States in the geographical sense, and not to forbid Congress from exercising the ordinary sovereign power of taxation as to the products of other sections of country not included within the geographical boundaries of the States; for which we rely upon the opinion of this court in *Knowlton* v. *Moore* as decisive and conclusive.

If the foregoing propositions are sound, then it is established (1) that the tariff act of 1897 was intended by Congress to classify as foreign all countries not a part or belonging to the United States at the time of its passage, and the subsequent cession of the Spanish islands to the United States did not operate to admit imports from those islands free of duty, under that law; (2) that the tariff act so construed and enforced violates no constitutional rule of uniformity.

And the case of the plaintiffs in error would seem on these grounds to have no legal foundation.

The Government might well be content to rest its argument upon these propositions. But counsel for the plaintiffs in error, in the court below as well as in this court, have gone far beyond these limits, and have challenged and denied the constitutionality of certain provisions of the treaty of Paris, contending that the cession of Porto Rico and the Philippine Archipelago effected a complete incorporation of those countries with the United States, so that they have become a part of the United States in the fullest and largest sense, not only internationally, but organically, so completely, indeed, that no difference or distinction can be made by law between imports from those countries and imports from one of the States of the Union.

They insist that there can be no limited or qualified acquisition of territory by this nation; that when Porto Rico was ceded to the United States it came at once under the obligations of the Constitution and became entitled to the privileges of the Constitution, its inhabitants citizens of the United States, and its territory a part of the United States. They argue, therefore, that the clause of the treaty which says that "the civil rights and political status of the inhabitants shall be determined by the Congress," in so far as it is intended to defer the full enjoyment of the rights and privileges of citizenship under the Constitution until Congress shall bestow them hereafter upon the inhabitants, is *ultra vires* and void, or at least superfluous and ineffective, because the Constitution *ex proprio vigore* extends at once, as an automatic operation, to all territory ceded to this Government, and no treaty or treaty-making power can hinder or even suspend it.

Inasmuch as the right to bring goods into a port of the United States free of duty is not one pertaining to American citizens any more than to aliens, the discussion of the citizenship of the Porto Ricans and Filipinos would seem to be irrelevant; but the importance of the question and the attention given to it, as well as to the other cognate contentions on the part of the counsel of plaintiffs, seem to make it necessary to answer their arguments and demonstrate the entire constitutionality of the conduct and policy of the executive and legislative branches of the Government in dealing with these subjects of grave importance which have been so recently and multitudinously thrust upon them in the quick progress of events.

There is no doubt that it was the intention of the treaty of Paris not to make the ceded islands a part of the United States.

No doubt, also, it was intended by that instrument not to make the inhabitants citizens.

So that if the treaty is not to have effect as so intended it must be because it violates in some respects the Federal Constitution, and this court is called upon to declare the treaty void in the respects before referred to.

No particular provision of the Constitution is cited or relied on by counsel to justify such an unprecedented judgment, but a principle is sought to be deduced from the nature of our organization as a government which, they say, forbids this nation to hold sovereignty over subject territory which it does not make a part of itself under the Constitution. If this were true, it would be a limitation upon the usual and necessary powers of a sovereign independent nation of such tremendous importance as to justify us in inquiring why it was not clearly expressed in the fundamental law by the men who drafted our

Constitution. They were learned in the law of nations, they knew the nature of colonies and provinces and how they were acquired by treaty and conquest and discovery, and how they were held and governed by other nations. They gave to the nation they founded the usual untrammeled powers of making war and treaties, the most frequent methods by which foreign territory is acquired by the nations of the earth. If they intended to restrict or limit their own government in these respects, would they not have done so in express terms? They did not do so by any language which can even be suggested as capable of such import, and it is therefore right—nay, necessary—to conclude that they did not intend to do so.

But I shall not rest on the mere negative inference. I shall show that they did not intend so to limit or curtail the national power and sovereignty; that so far from their intending to organize a government which should be incapable of acquiring foreign territory except upon condition of making it an organic part of the United States, the early statesmen of the Republic were under the impression that no territory could be annexed to and become a part of the United States without amending the Constitution.

They were clear in their view that we could acquire territory, but all doubted, and many denied positively, that it was within the constitutional power either of the President and Senate by treaty, or of the President and Congress as the law-making branches, to add to the original limits of the United States. They had no doubts whatever as to the power of Congress to govern acquired territory on the basis of a colony or province, or as territory outside of the Union.

I shall show that the practical construction put upon the Constitution by the Executive and Congressional branches of the Government for a hundred years has, with one partial exception, been uniform in regarding acquired territory as neither bound nor privileged by that instrument until brought within its operation, either by express compact in the treaty or by act of Congress; and that acts of Congress do not apply to after-acquired territory until extended to it by subsequent legislative enactment.

Counsel have been at great pains to prove that the Government of the United States is one of delegated powers, and that its powers are not absolute and untrammeled, but subject to certain limits never and nowhere to be transcended; that the vague political entity known as The People stands behind the constituted agencies of government, holding in reserve the sources of supreme power, capable and ready to alter or destroy at its pleasure the machinery heretofore set up in its behalf. They call these doctrines truisms, and so they are. They do not help us in this case.

The Government of the United States has been vested not with all powers, but only with certain particular powers. These particular delegated powers are in some respects limited and confined in scope and operation, but in other respects they are entirely unlimited. So that the real and practical question is whether there is any limitation preventing the particular thing here complained of.

It is worth while, in passing, to allude to the undeniable fact that "The People" referred to are not the people of the Territories or of the outlying possessions of the United States, but the people of the several States, who ordained and established for themselves and their posterity the Federal Constitution.

Counsel confuse ideas when they argue that the contention of the

Government in these cases implies the possession by Congress of all unlimited and despotic powers in the government of territory.

We mean no more than this court meant when it said:

> "The power of Congress over the Territories is general and plenary.
>
> "Its sovereignty over them is complete.
>
> "It has full and complete legislative authority over the people of the Territories and all departments of the Territorial governments.
>
> "The people of the United States, as sovereign owners of the national Territories, have supreme power over them and their inhabitants.
>
> "In legislating for the Territories Congress would doubtless be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but these limitations would exist rather by inference and the general spirit of the Constitution than by any express and direct application of its provisions."

No one pretends that Congress, irrespective of any limitation of the Constitution, could properly make and enforce a law to take without cause property of one person and vest it in another; nor that it could by legislative act decree or enforce the death of a person where no offense had been proven or alleged; nor that it could properly constitute a person a judge in his own case; nor expel without cause a citizen from its territory. These are all instances of despotic power which no Congress would claim, much less attempt to exercise.

But there may be, and are, vested in Congress, by the people, certain powers which, though subject to limitations in some respects, are absolute, unlimited, and unrestricted in other respects. For instance, the power to raise revenue by taxation in its various forms is, within the States, limited to the principle of geographical uniformity; but as to inherent uniformity it has no restriction whatever. Nor is there any limit upon the power or discretion of Congress to fix the rates of taxation upon particular kinds of property. This court has recognized that the power to tax is the power to destroy. Congress can tax property out of existence. It can practically prohibit importations by duties which are denominated protective.

Private property may not be taken for public use except upon just compensation, but there is no limit as to the quantity, location, or kinds of private property that may be absorbed in the public administration.

There is no definition or limitation of the causes for which war may be declared and carried on, and no restriction as to the terms upon which peace may be concluded.

Since the day of *McCulloch* v. *Maryland*, this court has been engaged continuously in endeavoring to ascertain and fix the precise points at which the powers of Congress are limited by the Constitution, and the points where its powers are plenary and unrestricted. A doctrine as general as the statement of counsel for the claimants in these cases would have relieved this court of the larger part of its work for a century.

In ordaining the Constitution and fixing the powers of the various instrumentalities created thereby, the reliance of the people was not more on express prohibitions or restrictions than upon the sense of justice and the patriotic purpose of their own representatives whose

policies and action are open to popular review and correction at stated periods by means of Congressional elections.

There is no power of legislation that can not be exercised harshly and with essential injustice toward some persons, but the exercise of the power is not from that fact to be declared unconstitutional. Many laws which are wise and just and for the general welfare operate hardly on individual cases, but they are not for that reason to be denounced as despotic or tyrannical.

There is no similarity between what the Government is attempting to do in these cases, namely, impose a tariff upon goods brought from an outlying possession of the United States into a port of the Union, and what, in the contemplation of Chief Justice Taney, was proposed in the case of Dred Scott. To the eye of the court, in the latter case, the facts assumed a posture in which the private personal property of a citizen, property as strictly vested in him by the principles of the Constitution as any ordinary chattel, was to be taken from him merely because he carried it from a State where it was lawful and constitutional property to a place where a law of Congress had declared that property in slaves should no longer exist. The proposition was to declare that which in one place was property to be no longer property, but an emancipated person, free from restraint, control, or ownership.

No such claim is set up here. There is no proposition to confiscate or destroy the possessible quality of the plaintiff's merchandise. It is a mere demand of a right to tax it at the custom-house.

The right to tax at our own ports merchandise coming from outlying territory of the United States is not a strange nor an unusual exercise of power. There is nothing essentially unjust in such a practice. It may be made unjust by the severity of the tax or the rigor of the prohibition, but so may any other kind of a custom-house imposition.

Such a practice has long been followed by every civilized power. England to-day levies duties on the merchandise of all her colonies when brought into the United Kingdom. She did the same in ante revolutionary days, and we will not find among the complaints of the American colonists any protest on this score.

I.

Power of United States to Acquire Territory.

The United States as a sovereign nation possesses the same power of acquiring territory possessed by other nations.

It may constitutionally acquire territory (1) by conquest, (2) by treaty, (3) by annexation, and (4) by discovery.

American Insurance Co. v. *Canter*, 1 Peters, 511;
Mormon Church v. *United States*, 136 U. S., 42;
United States v. *Huckabee*, 16 Wall., 414, 434;
Jones v. *United States*, 137 U. S., 202, 212;
Shiveley v. *Bowlby*, 152 U. S., 1, 50;
Legal Tender Cases, 12 Wall., 554.

This sovereign national power was asserted in the Declaration of Independence:

> "As free and independent States, they (the United States of America) have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do."

II.

The Power to Govern Acquired Territory.

1. THE CONSTITUTION AND THE CASES.

The Constitution, Article IV, section 3, paragraph 2, declares:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

In *American Insurance Company* v. *Canter* (1 Peters, 541), Chief Justice Marshall said:

> "The Constitution confers absolutely on the Government of the Union the powers of making war and of making treaties; consequently that Government possesses the power of acquiring territory, either by conquest or by treaty.
>
> "The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and the general conduct of individuals remains in force until altered by the newly created power of the state."

This was reiterated in *United States* v. *Gratiat* (14 Peters, 526).

And in the *Mormon Church Case* (136 U. S., 42) Justice Bradley declared:

> "The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory and no power to govern it when acquired. The power to acquire territory, other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty. The Territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the

Government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting these territories. Having rightfully acquired said territories, the United States Government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident.

"Mr. Justice Nelson, delivering the opinion of the court in *Benner* v. *Porter* (9 How., 235, 242), speaking of the Territorial government established by Congress, says: 'They are legislative governments, and their courts legislative courts, Congress, in the exercise of its power in the organization and government of the Territories, combining the powers of both the Federal and State authorities.'

"Chief Justice Waite, in the case of *National Bank* v. *County of Yankton* (101 U. S., 129, 133), said: 'In the organic act of Dakota there was not an express reservation of power in Congress to amend the act of the Territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the Territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial government. It may do for the Territories what the people, under the Constitution of the United States, may do for the States.'

"In a still more recent case, and one relating to the legislation of Congress over the Territory of Utah itself, *Murphy* v. *Ramsey* (114 U. S., 15, 44), Mr. Justice Matthews said: 'The counsel for the appellants in argument seem to question the constitutional power of Congress to pass the act of March 22, 1882, so far as it abridges the rights of electors in the Territory under previous laws. But that question is, we think, no longer open to discussion. It has passed beyond the stage of controversy into final judgment. The people of the United States as sovereign owners of the national Territories have supreme power over them and their inhabitants. In the exercise of this sovereign dominion they are represented by the Government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution or are necessarily implied in its terms.' Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions."

International law declares that the new sovereign may deal with the inhabitants of conquered or ceded territory and give them such laws as it sees fit. They receive privileges and political benefits at the will

of the new government, and not by virtue of the automatical operation of the laws of the new sovereign. (*Johnson* v. *McIntosh*, 8 Wheat., 543, 589; Vattel, book 3, chap. 13, sec. 200; Calvin's Case, 7 Coke, 17; *Campbell* v. *Hall*, Cowper, 209; 2 Halleck's International Law, 475; Hall's International Law, 593.)

> "The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually they are incorporated with the victorious nation and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections and united by force to strangers.
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> "When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, *or safely governed as a distinct people*, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he can not neglect them without injury to his fame and hazard to his power." (*Johnson* v. *McIntosh*, 8 Wheat., 543, 589.)

Other expressions in opinions of this court relative to the power and control of Congress over acquired territory include the following:

Clinton v. *Englebrecht* (13 Wall., 434), where Chief Justice Chase said:

> "The theory upon which the various governments for portions of the territory of the United States have been organized has been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority and with certain fundamental principles established by Congress (p. 441)."

Again, on page 447, it is said:

> "There is no Supreme Court of the United States, nor is there any district court of the United States, in the sense of the Constitution, in the Territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution or the General Government. The courts are the legislative courts of the Territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States."

National Bank v. *County of Yankton* (101 U. S., 129):

> "It is certainly now too late to doubt the power of Congress to govern the Territories. There have been some differences of opinion as to the particular clause of the Constitution from which

the power is derived, but that it exists has always been conceded. The act to adapt the ordinance to provide for the government of the territory northwest of the river Ohio to the requirements of the Constitution (1 Stat., 50) is chapter 8 of the first session of the First Congress, and the ordinance itself was in force under the Confederation when the Constitution went into effect. All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the General Government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the Territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

"In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the Territorial legislature, nor was it necessary. Such a power is an incident of sovereignty and continues until granted away. Congress may not only abrogate laws of the Territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the Territorial legislature valid, and a valid one void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States."

Murphy v. *Ramsey* (114 U. S., 15):

"The people of the United States, as sovereign owners of the national Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion they are represented by the Government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms." (Matthews, J.)

McAllister v. *United States* (141 U. S., 174), in which Mr. Justice Harlan, expressing the opinion of the court, said:

"An elaborate argument, displaying much thought and extended research upon the part of counsel, has been made in support of the proposition that, upon general principles, lying at the foundation of our institutions, the judicial power in the Territories, exercised as it must be for the protection of life, liberty, and property, ought to have the guaranties that are provided elsewhere within the political jurisdiction of the nation for the independence and security of judicial tribunals created by Congress under the third article of the Constitution. We have no occasion to controvert the soundness of this view, so far as it rests on grounds of public policy. But we can not ignore the fact that while the Con-

stitution has, in respect to judges of courts in which may be vested the judicial power of the United States, secured their independence by an express provision, that they may hold their offices during good behavior and receive at stated times a compensation for their services that can not be diminished during their continuance in office, no such guaranties are provided by that instrument in respect to judges of courts created by or under the authority of Congress for a Territory of the United States. The absence from the Constitution of such guaranties for Territorial judges was no doubt due to the fact that the organization of governments for the Territories was but temporary, and would be superseded when the Territories became States of the Union. The whole subject of the organization of Territorial courts, the tenure by which the judges of such courts shall hold their offices, the salary they receive, and the manner in which they may be removed or suspended from office was left by the Constitution with Congress under its plenary power over the Territories of the United States. How far the exercise of that power is restrained by the essential principles upon which our system of government rests, and which are embodied in the Constitution, we need not stop to inquire, though we may repeat what was said in *Mormon Church* v. *United States* (136 U. S., 1, 44): 'Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.'"

Mr. Justice Gray said, in *Shively* v. *Bowlby* (152 U. S., 48):

"The United States having rightfully acquired the Territories, and being the only Government which can impose laws upon them, have entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a Territorial condition."

Benner v. *Porter*, (9 Howard, 235). (Decided January term, 1850.)

While Florida was a Territory, Congress established courts there in which cases appropriate to Federal and State jurisdictions were tried indiscriminately. Florida was admitted into the Union as a State March 3, 1845. A Territorial court in 1846 took cognizance of a case of libel. This court, under the Territorial law, had been invested with jurisdiction in maritime cases. (*American Insurance Company* v. *Canter*, 1 Peters, 511.) Held: That by the act of Congress admitting Florida the admiralty jurisdiction of the Territorial court was superseded and vested in the United States court exclusively. Mr. Justice Nelson, in delivering the opinion of the court, said:

"The distinction between the Federal and State jurisdictions, under the Constitution of the United States, has no foundation in these Territorial governments, and consequently no such distinction exists, either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the

Territories, combining the powers of both the Federal and State authorities. There is but one system of government, or of laws operating within their limits, as *neither is subject to the constitutional provisions in respect to State and Federal jurisdiction.*

"They are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law, but are the creations, exclusively, of the legislative department, and subject to its supervision and control. Whether or not there are provisions in that instrument which extend to and act upon these Territorial governments, it is not now material to examine. We are speaking here of those provisions that refer particularly to the distinction between Federal and State jurisdiction."

In the case of *United States* v. *Kagama* (118 U. S., 379) Mr. Justice Miller said:

"But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. The Territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress. What authority the State governments may have to enact criminal laws for the Indians will be presently considered. But this power of Congress to organize Territorial governments and make laws for their inhabitants arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United States as from the ownership of the country in which the Territories are and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else." (*Murphy* v. *Ramsey*, 114 U. S., 15, 44.)

In *Endleman et al.* v. *United States* (86 Fed. Rep., 457), concerning section 14, act of May 17, 1884, prohibiting the sale of intoxicating liquors in Alaska, the circuit court of appeals for the ninth circuit says:

"In support of the first ground of demurrer it is contended that the law upon which the prosecution is based is unconstitutional, because, among other things, the Government of the United States can exercise only those specific powers conferred upon it by the Constitution; that the Constitution guarantees to the citizens the right to own, hold, and acquire property, and makes no distinction as to the character of the property; that intoxicating liquors are property, and are subjects of exchange, barter, and traffic like any other commodity in which a right of property exists; that inasmuch as the power to regulate commerce was committed to Congress to relieve it from all restrictions, Congress can not itself impose restrictions upon commerce by prohibiting the sale of a particular commodity; that if Congress has the power

to regulate the sale of intoxicating liquors within the Territories as a police regulation, it can only enact laws applicable to all the Territories alike. The answer to these and other like objections urged in the brief of counsel for defendant is found in the now well-established doctrine that the Territories of the United States are entirely subject to the legislative authority of Congress. They are not organized under the Constitution, nor subject to its complex distribution of the powers of government as the organic law, but are the creation exclusively of the legislative department and subject to its supervision and control. (*Benner* v. *Porter*, 9 How., 235, 242.) The United States, having rightfully acquired the Territory, and being the only Government which can impose laws upon them, has the entire dominion and sovereignty, national and municipal, Federal and State. (*Insurance Co.* v. *Canter*, 1 Pet., 511, 542; *Cross* v. *Harrison*, 16 How., 164, 193; *National Bank* v. *Yankton Co.*, 101 U. S., 129, 133; *Murphy* v. *Ramsey*, 114 U. S., 15, 44, 5 Sup. Ct., 747; *Late Corporation of Church of Jesus Christ of Latter-Day Saints* v. *United States*, 136 U. S., 1, 42, 43, 10 Sup. Ct., 792; *McAllister* v. *United States*, 141 U. S., 174, 181, 11 Sup. Ct., 949; *Shively* v. *Bowlby*, 152 U. S., 1, 48, 14 Sup. Ct., 548.) Under this full and comprehensive authority Congress has unquestionably the power to exclude intoxicating liquors from any or all of its Territories or limit their sale under such regulations as it may prescribe. It may legislate in accordance with the special needs of each locality and vary its regulations to meet the conditions and circumstances of the people. Whether the subject elsewhere would be a matter of local police regulation, or within State control under some other power, it is immaterial to consider. In a Territory all the functions of government are within the legislative jurisdiction of Congress, and may be exercised through a local government or directly by such legislation as we have now under consideration."

In the case of *New Orleans* v. *Steamship Company* (20 Wallace, 373), the following statement of the broad and untrammeled power of the conqueror of territory was made:

"Although the city of New Orleans was conquered and taken possession of in civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the National Government in the Confederate States, that Government had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. In such cases the conquering power has a right to displace the preexisting authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. *There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war.* These principles have the sanction of all publicists who have considered the subject."

Story, writing in 1833, and following closely the language of Chief Justice Marshall in *Insurance Co.* v. *Canter*, thus expresses the power of the National Government with reference to ceded territory:

> "As the General Government possesses the right to acquire territory, either by conquest or by treaty, it would seem to follow, as an inevitable consequence, that it possesses the power to govern what it has so acquired. The territory does not, when so acquired, become entitled to self-government, and it is not subject to the jurisdiction of any State. It must, consequently, be under the dominion and jurisdiction of the Union, or it would be without any Government at all. In cases of conquest the usage of the world is, if a nation is not wholly subdued, to consider the conquered territory as merely held by military occupation until its fate shall be determined by a treaty of peace. But during this intermediate period it is exclusively subject to the Government of the conqueror. In cases of confirmation or cession by treaty, the acquisition becomes firm and stable; and the ceded territory becomes a part of the nation to which it is annexed, either on terms stipulated in the treaty or on such as its new master shall impose. The relations of the inhabitants with each other do not change; but their relations with their former sovereign are dissolved and new relations are created between them and their new sovereign. The act transferring the country transfers the allegiance of its inhabitants. But the general laws, not strictly political, remain as they were until altered by the new sovereign. If the treaty stipulates that they shall enjoy the privileges, rights, and immunities of citizens of the United States, the treaty, as a part of the law of the land, becomes obligatory in these respects. Whether the same effects would result from the mere fact of their becoming inhabitants and citizens by cession, without any express stipulation, may deserve inquiry, if the question should ever occur. But they do not participate in political power; nor can they share in the powers of the General Government until they become a State and are admitted into the Union as such. Until that period the territory remains subject to be governed in such manner as Congress shall direct, under the clause of the Constitution now under consideration." (2 Story on the Constitution, par. 1324.)

Again he says, in paragraph 1328:

> "The power of Congress over the public territory is clearly exclusive and universal; and their legislation is subject to no control, *but is absolute and unlimited, unless so far as it is affected by stipulations in the cessions, or by the ordinance of 1787*, under which any part of it has been settled."

If it be true, as contended, that the general limitations of the Constitution were intended for the protection of Territories as well as States; if unlimited power of legislation in Congress was to be denied as to the people and lands outside the Union to the same extent as it is denied as against the people and lands within the States of the Union, then why should not the independence of the Federal judiciary, which is guaranteed in the Constitution by a life tenure of office and immunity from reduction of salary, have been likewise guaranteed to the courts of the Territories?

Here we have one of the specific causes of revolution contained in the Declaration of Independence. In its catalogue of Royal wrongs it recites the making of the tenure of the judicial offices dependent on the will of the King, and the amount and payment of their salaries subject to the Royal pleasure.

If the Constitution intended in all respects to protect the inhabitants of the territories from the commission by Congress of the same wrongs which George the Third and the English Parliament had committed against the people of the Thirteen Colonies, then it remains for counsel to explain why such an important and valuable guaranty as the maintenance of the independence of the judiciary should have been left out. Here is an instance where the people of the States are protected against a very real danger, and one not unlikely in the stress of political passion to be perpetrated; but this valuable safeguard, by the clear and undisputed decision of this court, does not extend to the territorial judiciary.

2. JEFFERSON'S DOUBTS AS TO THE CONSTITUTIONALITY OF THE LOUISIANA TREATY.

It is a common error, long disseminated and many times repeated, to assert that Jefferson was under the belief that the United States had no constitutional power to acquire foreign territory.

That which is commonly cited in support of this erroneous view attributed to Jefferson is his letter to Senator Breckenridge of Kentucky, August 12, 1803, some months after the treaty with France had been signed. The language there used is as follows:

> "This treaty must, of course, be laid before both Houses, because both have important functions to exercise respecting it. They, I presume, will see their duty to their country in ratifying and paying for it, so as to secure a good which would otherwise probably be never again in their power. But I suppose they must then appeal to the nation for an additional article to the Constitution approving and confirming an act which the nation had not previously authorized. The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union. The Executive, in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution."

If this language stood by itself and were the only utterance of Jefferson on the subject, it would justify that belief as to his opinion on the constitutional question which has been commonly attributed to him. An examination, however, of his writings and of his whole course of action with reference to the Louisiana purchase, especially with reference to the constitutional question, shows conclusively that Mr. Jefferson's doubt was not with reference to the power of the United States *to acquire foreign territory*, but rather as to the right *to annex it to and make it a part of the United States.*

When in January, 1803, the President decided to send James Monroe to France with $2,000,000 to buy New Orleans and Florida, a question was raised as to the form in which such a purchase could be constitutionally made.

The Attorney-General, Levi Lincoln, suggested that the treaty should be so framed as to make it appear that the United States was not acquiring territory, but as extending already existing territory by an alteration of its boundary.

Jefferson sent Lincoln's letter to Gallatin. Gallatin was really the constitutional lawyer of Jefferson's Administration, although he was Secretary of the Treasury. He immediately exposed the impracticability and fallacy of the Attorney-General's scheme, and suggested the view that prevailed with Jefferson and has been maintained and sanctioned by the executive and judicial departments of the Government to the present day. "But," said he, "does any constitutional objection really exist? To me it would appear (1) that the United States as a nation have an inherent right to acquire territory; (2) that whenever that acquisition is by treaty, the same constituted authorities in which the treaty-making power is vested have a constitutional right to sanction the acquisition; (3) that whenever the territory has been acquired Congress have the power either of admitting into the Union as a new State or of annexing to a State, with the consent of that State, or of making regulations for the government of such territory." (Gallatin's writings, vol. 1, p. 11, etc.)

To this letter Jefferson replied. The day of the month is not given, but the date is January, 1803. He said: "You are right, in my opinion, as to Mr. L.'s proposition: *There is no constitutional difficulty as to the acquisition of territory, and whether when acquired it may be taken into the Union by the Constitution as it now stands* will become a question of expediency. I think it will be safer not to permit *the enlargement of the Union* but by amendment of the Constitution." (Gallatin's writings, vol. 1, p. 115.)

It is reasonable to suppose that whatever constitutional defects Mr. Jefferson believed to exist he would have attempted to cure by any such amendment as he might prepare on that subject.

It is well known that he prepared two different drafts of amendment to the Constitution to cover the Louisiana question. The first draft was probably sent to Mr. Gallatin in July, 1803, for in a letter of July 9 of that year Mr. Gallatin says: "The amendment to the Constitution is intended, I presume, for deliberation and reflection, but not for immediate decision."

This draft declares:

> "The province of Louisiana *is incorporated with the United States and made part thereof.* The rights of occupancy in the soil and of self-government are confirmed to Indian inhabitants as they now exist." It then proceeded with other provisions relative to Indian rights and possession and exchange of lands, and forbidding Congress to dispose of the lands otherwise than is therein provided without further amendment to the Constitution. This draft closes thus: "Except as to that portion thereof which lies south of the latitude of 31°, which, whenever they deem expedient, they may enact into a Territorial government, either separate or as making part with one on the eastern side of the river, *vesting the inhabitants thereof with all rights possessed by other Territorial citizens of the United States.*" (Writings of Jefferson, edited by Ford, vol. 8, p. 241.)

On August 23, 1803, Jefferson sent Gallatin another form of amendment which he declared he thought a better form than the one communicated to him before. That draft was as follows:

> "Louisiana as ceded by France to the United States is made *a part of the United States.* Its *white inhabitants* shall be *citizens*, and stand, as to their rights and obligations, on the same footing

with other citizens of the United States in analogous situations. Save only that, as to the portion thereof lying north of the latitude of the mouth of Arcansa River, no new State shall be established nor any grants of land made therein other than to Indians in exchange for equivalent portions of lands occupied by them until an amendment of the Constitution shall be made for these purposes.

"Florida also, whensoever it may be rightfully obtained, shall become a part of the United States. Its white inhabitants shall thereupon become citizens, and shall stand, as to their rights and obligations, on the same footing with other citizens of the United States in analogous situations."

Under date of July 7, 1803, Jefferson wrote to William Dunbar:

"Before you receive this you will have heard through the channel of the public papers of the cession of Louisiana by France to the United States. The terms as stated in the National Intelligencer are accurate. That the treaty may be ratified in time, I have found it necessary to convene Congress on the 17th of October, and it is very important for the happiness of the country that they should possess all information which can be obtained respecting it, that they make the best arrangements practicable for its good government. It is most necessary, because they will be obliged to ask from the people *an amendment of the Constitution authorizing their receiving the province into the Union* and providing for its government, and limitations of power which shall be given by that amendment will be unalterable but by the same authority." (Jefferson's Writings, vol. 8, p. 254.)

Wilson Cary Nicholas, a warm personal and political friend of Jefferson, conferred with him upon the constitutional question, and early in September wrote Jefferson a letter in which he declared that upon an examination of the Constitution he found the power as broad as it could well be made, except that new States can not be formed out of the old ones without the consent of the State to be dismembered. (Adams's History of the United States, vol. 2, p. 87.)

On September 7, 1803, Jefferson, in reply, wrote to Nicholas:

"I am aware of the force of the observations you make on the power given by the Constitution to Congress *to admit new States into the Union without restraining the subject to the territory then constituting the United States.* But when I consider that the limits of the United States are precisely fixed by the treaty of 1783, that the Constitution expressly declares itself to be made for the United States, I can not help believing that *the intention was to permit Congress to admit into the Union new States which should be formed out of the territory for which and under whose authority alone they were then acting.* I do not believe it was meant that they might receive England, Ireland, Holland, etc., into it, which would be the case under your construction. When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather ask an enlargement of power from the nation where it is found necessary than to assume it by a construction which would make our powers boundless." (Writings of Jefferson, vol. 8, p. 247.)

On August 18 we find Jefferson writing to Breckenridge again, and this time showing a modification of the views expressed in his previous letter. He says:

> "I wrote you on the 12th instant on the subject of Louisiana and the constitutional provision which *might be* necessary for it. A letter received yesterday shows that nothing must be said on that subject which may give a pretext for retraction, but that we should do *sub silentio* what shall be found necessary."

Writing to James Madison on the same date, he said:

> "I infer that the least we say about constitutional difficulties respecting Louisiana the better, and that what is necessary for surmounting them must be done *sub silentio*." (Writings of Jefferson, vol. 8, p. 245.)

This correspondence demonstrates conclusively that whatever doubt Jefferson had as to the constitutional authority for the Louisiana treaty related, not to acquiring territory, but to the right either of the treaty-making power or of Congress to annex it to or incorporate it into the Union. He had declared as early as January, in answer to Gallatin's statement of his opinion on the subject, that there was no constitutional difficulty as to the *acquisition* of territory, but that the question was whether it might be taken into the Union by the Constitution as it stood. In that letter, the enlargement of the Union is the thing which he thinks it would be safer not to permit except by amendment.

And when he set about preparing an amendment to cure the doubt which existed in his mind as to the constitutional authority, he did not provide that the United States might have power to acquire territory, because he was of the opinion, and so were all his Cabinet, that such power already existed, and no one seems to have suggested the contrary. What he did provide for by his amendments was the incorporation of Louisiana with the United States. The first draft is in this respect substantially the same as the second.

The first draft declares: "The province of Louisiana is *incorporated with the United States and made a part thereof*."

The second draft declares: "Louisiana, as ceded by France to the United States, *is made a part of the United States*."

By the time Congress had assembled, on October 17, Mr. Jefferson's doubt as to the constitutional power of admitting the new territory into the Union seems to have entirely vanished. He does not seem to have supposed, however, that the territory had become incorporated into the Union or would become so incorporated by virtue of the mere treaty of cession. In his message to Congress, transmitted on October 17, he referred to that body the subject of government of the territory, as well as its incorporation into the Union, saying:

> "With the wisdom of Congress it will rest to take those ulterior measures which may be necessary for immediate occupation and temporary government of the country; *for its incorporation into the Union*." (Jefferson's Writings, vol. 8, p. 269.)

Letter of President Jefferson to the Secretary of State (James Madison):

"MONTICELLO, *July 14, 04.*

"The enclosed reclamations of Girod & Chote against the claims of Bapstropp to a monopoly of the Indian commerce sup-

posed to be under the protection of the 3d article of the Louisiana Convention, as well as some other claims to abusive grants, will probably force us to meet that question. The article has been worded with remarkable caution on the part of our negociators. It is that the inhabitants shall be admitted as soon as possible, according to the principles of our Constitn., to the enjoyment of all the rights of citizens, and, *in the mean time*, en attendant, shall be maintained in their liberty, property & religion. That is that they shall continue under the protection of the treaty, *until the principles of our constitution can be extended to them*, when the protection of the treaty is to cease, and that of our own principles to take it's place. But as this could not be done at once, it has been provided to be as soon as our rules will admit. *Accordingly Congress has begun by extending about 20. particular laws by their titles, to Louisiana.* Among these is the act concerning intercourse with the Indians, which establishes a system of commerce with them admitting no monopoly. That class of rights therefore are now taken from under the treaty & placed under the principles of our laws. I imagine it will be necessary to express an opinion to Gov. Claiborne on this subject, after you shall have made up one."

(Writings of Thomas Jefferson (Ford), Vol. VIII, p. 313.)

In another letter to Madison, under date of August 15, 1804, Jefferson says:

"I am so much impressed with the expediency of putting a termination to the right of France to patronize the rights of Louisiana, which will cease with their complete adoption as citizens of the United States, that I hope to see that take place on the meeting of Congress." (Idem, p. 315.)

Madison had the same opinion which Jefferson held, that we could lawfully acquire but could not incorporate or confer citizenship by means of a treaty.

Article III of the Louisiana treaty violated the instructions which Madison had given to the commissioners, Livingston and Monroe. In his letter to them of March 2, 1803, he had told them "to incorporate the inhabitants of the hereby ceded territory with the citizens of the United States being a provision which cannot now be made, it is to be expected from the character and policy of the United States that such incorporation will take place without unnecessary delay." (State Papers, II, 540.)

The insertion of this clause appears to have been due to the insistment of the First Consul. (Adam's History of U. S., II, 45.) It is probable that, with slight alterations it was drafted by Bonaparte.

3. DEBATES IN CONGRESS CONCERNING THE LOUISIANA PURCHASE.

The debates that arose in the Senate and House of Representatives upon the bill authorizing the creation of a stock to pay the purchase money for Louisiana and the bill to provide a temporary government for Louisiana are preserved in the Annals of Congress, volume 13, and are likewise confirmatory and conclusive that whatever doubts may have existed among public men at that day as to the constitutional

authority related not to the acquisition of territory, but *to the right either of the treaty-making power or of Congress to attach it to or make it a part of the territory of the United States.* Both Federalists and Republicans agreed on this point.

In the Senate, Timothy Pickering, voicing the views of the Federalists, said:

> "It is declared in the third article that the inhabitants of the ceded territory shall be incorporated in the Union of the United States. *But neither the President and Senate nor the President and Congress are competent to such an act of incorporation.*"

He believed that our Administration admitted that this incorporation could not be effected without an amendment of the Constitution. He believed the assent of each individual State to be necessary for the admission of a foreign country as an associate in the Union. *Mr. Pickering had never doubted the right of the United States to acquire new territory, either by purchase or by conquest, and to govern the territory so acquired as a dependent province;* and in this way might Louisiana have become a Territory of the United States and have received a form of government infinitely preferable to that to which its inhabitants are now subject.

John Taylor, of Virginia, voicing without doubt the views of the President and following the line of reasoning pursued by Gallatin in his letter to Jefferson, thus expressed his view of the power of the United States to acquire territory:

> "Before a confederation, each State in the Union possessed a right, as attached to sovereignty, of acquiring territory by war, purchase, or treaty. This right must be either still possessed or forbidden both to each State and to the General Government, or transferred to the General Government. It is not possessed by the States separately, because war and compacts with foreign powers and with each other are prohibited to a separate State; and no other means of acquiring territory exist. By depriving every State of the means of exercising the right of acquiring territory, the Constitution has deprived each separate State of the right itself. Neither the means nor the right of acquiring territory are forbidden to the United States; on the contrary, in the fourth article of the Constitution, Congress is empowered 'to dispose of and regulate the territory belonging to the United States.' This recognizes the right of the United States to hold territory. The means of acquiring territory consist of war and compact; both are expressly surrendered to Congress and forbidden to the several States; and no right in a separate State to hold territory without its limits is recognized by the Constitution, nor any mode of effecting it possible, consistent with it. The means of acquiring and the right of holding territory, being both given to the United States, and prohibited to each State, it follows that these attributes of sovereignty once held by each State are thus transferred to the United States; and that, if the means of acquiring and the right of holding are equivalent to the right of acquiring territory, then this right merged from the separate States to the United States, as indispensably annexed to the treaty-making power, and the power of making war; or, indeed, is literally given to the General Government by the Constitution."

In the course of his speech he further said:

> "Being incorporated in the Union as a Territory and not as a State, a stipulation for citizenship became necessary; whereas it would have been unnecessary had the inhabitants been incorporated as a State and not as a Territory. And as they were not to be invested with citizenship by becoming a State, the delay which would occur between the incorporation of the Territory into the Union and the arrival of the inhabitants to citizenship according to the principles of the Constitution, *under some uniform rule of naturalization*, exhibited an interim which demanded the concluding stipulation for 'protection in the meantime for liberty, property, and religion.' As a State of the Union, they would not have needed a stipulation for the safety of their 'liberty, property, and religion;' *as a Territory, this stipulation would govern and restrain the undefined powers of Congress to make 'rules and regulations for Territories.'* "

Uriah Tracy, of Connecticut, argued that the third article of the treaty, in undertaking to incorporate the inhabitants into the Union, was an unconstitutional compact. He declared, however:

> "I have no doubt but we can obtain territory either by conquest or compact, and hold it, even all Louisiana, and a thousand times more, if you please, without violating the Constitution. We can hold territory; but *to admit the inhabitants into the Union, to make citizens of them, and States, by treaty, we can not Constitutionally do;* and no subsequent act of legislation, or even ordinary amendment to our Constitution can legalize such measures. If done at all, they must be done by universal consent of all the States or partners to our political association. And this universal consent I am positive can never be obtained to such a pernicious measure as the admission of Louisiana—of a world, and such a world—into our Union."

John Quincy Adams declared that for his part he was free to confess that the third article, and more especially the seventh, contain engagements placing us in a dilemma from which he saw no possible mode of extricating ourselves but by an amendment, or rather an addition to the Constitution. Mr. Adams, however, voted with the supporters of Jefferson in favor of the passage of the bill.

On October 25, 1803, the House of Representatives, in Committee of the Whole, proceeded to discuss the Louisiana treaty. The opposition of the Federalists was based upon the alleged unconstitutionality of the third and seventh articles.

Gaylord Griswold, of New York, declared the third article to be a compact between the French Government and that of the United States to admit to citizenship persons out of the jurisdiction of the United States as it now is and to admit territory out of the United States to be incorporated into the Union. He did not find in the Constitution such a power vested in the President and Senate. He thought it was not consistent with the spirit of the Constitution that territory other than that attached to the United States at the time of the adoption of the Constitution should be admitted.

But if he were wrong in this contention and the right of extending the limits of the United States be given by the Constitution, its exer-

cise is vested in the legislative branches of the Government and not in the President and Senate, because the Constitution declares that new States may be admitted by Congress into this Union. (Annals of Congress, vol. 13, p. 431, etc.)

Mr. Griswold further argued that article 7 of the treaty was unconstitutional, because, if the new ceded territory, with the inhabitants, should become incorporated with the United States there would be ports of entry into the United States into which French and Spanish vessels may enter on terms different from those on which they may enter other ports of the United States, thereby violating the mandate of the Constitution which declares that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another. (Idem, 434.)

James Elliott, of Vermont, in replying to the objections urged against article 7, declared:

> "The States as such were equal and intended to preserve that equality; and the provision of the Constitution alluded to was calculated to prevent Congress from making any odious discriminations or distinctions between particular States. *It was not contemplated that this provision would have application to colonial or territorial acquisitions.*" (Idem, p. 450.)

Mr. Thatcher declared:

> "The Confederation under which we now live is a partnership of States, and it is not competent to admit a new partner but with the consent of all the partners. If such power exist it does not reside in the President and Senate. The Constitution says new States may be admitted by Congress. If this article of the Constitution authorizes the exercise of power under the treaty, it must reside with the legislature and not with the President and Senate."

Mr. Smilie, of Pennsylvania, answering the objectors, declared "another constitutional difficulty had been started, from the alleged obligation of the United States to incorporate this territory in the Union." He quoted the third article of the treaty, and declared that if the prevailing opinion should be that the inhabitants of the ceded territory can not be admitted under the Constitution as it now stands, the people of the United States can, if they see fit, apply a remedy by amending the Constitution so as to authorize their admittance. *And if they do not choose to do this, the inhabitants may remain in a colonial state.* (Idem, p. 457.)

Roger Griswold, of Connecticut, for the opposition, declared it scarcely possible for any gentleman to advance an opinion that the President and Senate may add to the members of the Union by treaty whenever they please; or, in the words of this treaty, may incorporate in the Union of the United States a foreign nation, who, from interest or ambition, may wish to become a member of our Government. Such a power would be directly repugnant to the original compact between the States, and a violation of the principles on which that compact was founded.

"I have been persuaded," said he, "that the framers of the Constitution never intended that a power should reside in the President and Senate to form a treaty by which a foreign nation and people shall be

incorporated into the Union, and that this treaty, so far as it stipulates for such an incorporation, is void." (Idem, p. 462.)

Answering Mr. Smilie, he further remarked:

> "A gentleman from Pennsylvania, however (Mr. Smilie), has said that it is competent for this Government to obtain a new territory by conquest, and if a new territory can be obtained by conquest, he infers that it can be procured in the manner provided for by the treaty. While I admit the premises of the gentleman from Pennsylvania, I deny his conclusion. *A new territory and new subjects may undoubtedly be obtained by conquest and by purchase, but neither the conquest nor the purchase can incorporate them into the Union. They must remain in the condition of colonies, and be governed accordingly.* The objection to the third article is not that the province of Louisiana could not have been purchased, but that neither this nor any other foreign nation can be incorporated into the Union by treaty or by a law; and as this country has been ceded to the United States only under the condition of an incorporation, it results that, if the condition is unconstitutional or impossible, the cession itself falls to the ground."

Nicholson, of Maryland, unquestionably speaking for the President and representing the views of the Administration, defended the constitutionality of the treaty. Referring to the objections urged against the third article, he used this language:

> "It can not be contended that the territory is *ipso facto* admitted, but the objection is, that the President and Senate have no right to pledge the Government for anything not immediately within their own powers." (Idem, p. 469.)

This objection, he contended, was not solid. Every day's practice proves that it is without any force whatever, because almost all treaties contain stipulations which must be performed by the Houses of Congress if they are ever performed at all.

He further used this significant language:

> "Whatever may be the future destiny of Louisiana, it is certain that it is not now a State. It is a territory purchased by the United States, in their confederate capacity, and may be disposed of by them at pleasure. *It is in the nature of a colony whose commerce may be regulated without any reference to the Constitution.* Had it been the island of Cuba which was ceded to us, under a similar condition of admitting French and Spanish vessels for a limited time into Habana, could it possibly have been contended that this would be giving a preference to the ports of one State over those of another, or that the uniformity of duties, imposts, and excises throughout the United States would have been destroyed? And because Louisiana lies adjacent to our own territory, is it to be viewed in a different light? Or can the circumstance of its being separated by a river only, instead of the sea, constitute any real difference in regard to the commercial regulations which we may think proper to establish? The restrictions in the Constitution are to be strictly construed; and I doubt whether, under a strict construction, the very same indulgence might not be granted to the port of Natchez, which does not lie within any State, but in the territory of the United States. It

has never been deemed expedient to do so, and in all probability never will. Nor is it presumable that this regulation in relation to New Orleans would have been made but for the importance of the great objects with which it was connected."

Cæsar A. Rodney, member from Delaware, afterwards Attorney-General, supported the constitutionality of the treaty. Among other things, he said:

"The Constitution adverts to States themselves, and the distinction between States and Territories is bottomed upon reason. Whence the necessity of the distinction? When Territories grow into States and become represented in the public councils, a majority of them may league together and carry into effect regulations prejudicial to other States. Hence the Constitution provides that in all commercial regulations all the States shall be equally affected. But such a league can not be effected by Territories, which have no Senators in the other branch, and in this only the voice, without the vote, of a single Delegate. Independent of this consideration is this: If by any particular territorial regulation the territory of the United States is benefited, that territory being the common property of the United States, a public stock in which they all share, every State in the Union reaps alike the benefit."

Samuel Mitchell, of New York, also defended the treaty in a notable speech, from which the following is extracted:

"In the case of Louisiana no injury is done either to the nation or to any State belonging to that great body politic. There was nothing compulsory upon the inhabitants of Louisiana to make them stay and submit to our Government; but if they chose to remain it had been most kindly and wisely provided that, until they should be admitted to the rights, advantages, and immunities of citizens of the United States, they shall be maintained and protected in the enjoyment of their liberty, property, and the religion which they profess. What would the gentleman propose that we shall do with them? Send them away to the Spanish provinces, or turn them loose in the wilderness? No, sir; it is our purpose to pursue a much more dignified system of measures. It is intended, first, to extend to this newly acquired people the blessings of law and social order; to protect them from rapacity, violence, and anarchy; to make them secure in their lives, limbs, and property, reputation, and civil privileges; to make them safe in the rights of conscience. In this way they are to be trained up in a knowledge of our own laws and institutions. They are thus to serve an apprenticeship to liberty; they are to be taught the lessons of freedom, and by degrees they are to be raised to the enjoyment and practice of independence. All this is to be done as soon as possible—that is, as soon as the nature of the case will permit, and according to the principles of the Federal Constitution. Strange that proceedings declared on the face of them to be constitutional should be inveighed against as violations of the Constitution! Secondly, after they shall have been a sufficient length of time in this probationary condition, they shall, as soon as the principles of the Constitution permit, and conformably thereto, be declared citizens

of the United States. *Congress will judge of the time, manner, and expediency of this. The act that we are now about to perform will not confer on them this elevated character.* They will thereby gain no admission into this House, nor into the other House of Congress. There will be no alien influence thereby introduced into our councils. By degrees, however, they will pass on from the childhood of republicanism, through the improving period of youth, and arrive at the mature experience of manhood. And then they may be admitted to the full privileges which their merit and station will entitle them to. At that time a general law of naturalization may be passed. *For I do not venture to affirm that, by the mere act of cession, the inhabitants of a ceded country become, of course, citizens of the country to which they are annexed. It seems not to be the case, unless specially provided for.* By the third article it is stipulated that the inhabitants of Louisiana shall hereafter be made citizens; *ergo* they are not made citizens of the United States by mere operation of treaty. In confirmation of this construction I will mention the second article of the treaty of amity, commerce, and navigation between the United States and His Britannic Majesty, concluded in 1794. It is therein stipulated that all British subjects who shall continue within the evacuated posts and precincts should be considered, if they remain there longer than one year, to have abandoned all allegiance to the Crown of Britain, and to have made their election to become citizens of the United States; after which, by taking the oath of allegiance, they became instantly, by act of treaty and by force of statute, citizens of the United States. I therefore consider the point already adjudged, when the treaty of 1794 was decided on, that without an act of Congress aliens can be converted into citizens by the provisions of a treaty duly ratified by the President and Senate. In the treaty respecting Louisiana there is happily no cause for alarm. This power of making citizens has not been exercised by the President and Senate, but at a future day may be used by Congress."

Referring to the objections urged against article 7, he declared:

"The preference forbidden by the Constitution applies to States in the Union and equal members thereof. The domain we are about to acquire is not a State; for that is a sovereign and independent republic. Nor is it a province; this being an inhabited country, subdued by force of arms. Nor is it a colony; which is a sprout or scion, as it were, of the parent trunk. In its relation to us, it is a territory; a word signifying a peculiar and mingled idea of a country and inhabitants in the inchoate or initial condition of a republic."

The resolution declaring that provision ought to be made for carrying into effect the treaty, etc., was adopted by a vote of 90 yeas to 25 nays.

On October 27 a further discussion arose in the House of Representatives upon consideration of the bill to enable the President of the United States to take possession of the territories ceded by France to the United States by treaty concluded the 30th of April last, and for other purposes.

Mr. Smilie, speaking for the Administration party, declared that the Constitution of the United States did not extend to this Territory

any further than they were bound by the compact between the ceding power and the people. On this principle they had a right, viewing it in the light of a colony, to give it such government as the United States might think proper, without thereby violating the Constitution; when incorporated into the Union the inhabitants must enjoy all the rights of citizens.

Mr. Griswold, having been referred to by Mr. Rodney in the debate, rose to an explanation. He wished, he said, once for all to state what he had stated on a previous occasion, and what he had stated that day. *He did admit that the United States might acquire territory by war or purchase, and he had always admitted this. But he had said that they could not by treaty admit a foreign country and incorporate it into the Union.*

This may be taken as a correct expression of the only difference that existed between the Federalists and the Administration party so far as the constitutionality of the Louisiana treaty was concerned.

In February, 1804, the House had under consideration the bill erecting Louisiana into two Territories and providing for the temporary government thereof, which was subsequently passed and approved by the President. The status of Louisiana and its inhabitants was then further discussed. Among other notable speeches was one by Dr. Eustis, of Massachusetts, from which the following citation is taken:

> "The people, in my opinion, are at present unprepared for and undesirous of exercising the elective franchise. The first object of the Government is to hold the country. How? By protecting the people in all their rights, and by administering the government in such a manner as to prevent any disagreement among them—to use no other term. Suppose the people called upon to choose those who are to make laws for them, does the information we possess justify the belief that this privilege would be so exercised as to conduce to the peace, happiness, and tranquillity of the country? I apprehend not. On the sentiments of the House on this point the decision of this motion must turn.
>
> "According to this bill, the governor and the council are to make the laws. Suppose the council is in session and the governor possesses no power to prorogue them. Suppose they should engage in acts subversive of their relation to the United States. Would not this power be of essential utility? It appears to me indispensably necessary that a vein of authority should ascend to the Government of the United States until the people of the territory are admitted to the full enjoyment of State rights. From that knowledge of this people which I have been able to acquire, I have formed an opinion that authority should be constantly exercised over them, without severity, but in such a manner as to secure the rights of the United States and the peace of the country.
>
> "The government laid down in this bill is certainly a new thing in the United States; but the people of this country differ materially from the citizens of the United States. I speak of the character of the people at the present time. When they shall be better acquainted with the principles of our Government, and shall have become desirous of participating in our privileges, it will be full time to extend to them the elective franchise. Have not the House been informed from an authentic source, since the cession, that the provisions of our institutions are inapplicable to them? If so,

why attempt, in pursuit of a vain theory, to extend political institutions to them for which they are not prepared? I am one of those who believe that the principles of civil liberty can not suddenly be ingrafted on a people accustomed to a regimen of a directly opposite hue. The approach of such a people to liberty must be gradual. I believe them at present totally unqualified to exercise it. If this opinion be erroneous, then the principles of the bill are unfounded. If, on the contrary, this opinion is sound, it results that neither the power given to the President to appoint the members of the council, or of the governor to prorogue them, are unsafe or unnecessary.

"Mr. Lucas said that without wishing to reflect on the inhabitants of Louisiana he would say that they are not prepared for a government like that of the United States. Governed by Spanish officers, exercising authority according to their whim, supported by a military force, it could not be said that a people thus inured to despotism were prepared on a sudden to receive the principles of our Government. It was questionable whether there was a nation in Europe whom these principles would be so advantageous to as they are to us. It would be recollected by gentlemen who so strenuously advocated the abstract principle of right that the people of Louisiana have not been consulted in the act of cession to this country, but had been transferred by a bargain made over their heads. It was a proof this act had not been received with approbation by them that when they saw the American flag hoisted in the room of the French they shed tears. This was a proof that they were not so friendly to our Government as some gentlemen imagined. He was persuaded the people of the Mississippi Territory would not have acted in this manner. There is no doubt but that after they shall have experienced the blessings of a free government they will wonder at their having shed tears on this occasion, but they must in the first instance feel these blessings."

4. GOUVERNEUR MORRIS' STATEMENT.

It is well known that the clause of the Constitution relating to territory (Art. IV, sec. 3, par. 2) was drafted by Gouverneur Morris. In a letter to Henry W. Livingston, December 4, 1803, he stated:

"I always thought that when we should acquire Canada and Louisiana it would be proper to govern them as provinces and allow them no voice in our councils. In wording the third section of the fourth article I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief that had it been more pointedly expressed a strong opposition would have been made."

5. THE POWER DOUBTED BY JEFFERSON NOW CONFIRMED BY JUDICIAL DECISION.

Notwithstanding the doubts expressed by Jefferson and Madison, as his Secretary of State, together with many other prominent statesmen of their day, as to the power of the President and Senate, by treaty provisions, to confer upon the inhabitants of ceded territory the rights and immunities of citizens of the United States, the validity of the exercise of this power by means of treaties may now be regarded as affirmed by judicial decision.

In *American Insurance Company* v. *Canter*, Chief Justice Marshall, referring to the sixth article of the treaty by which Florida was ceded

to the United States, which article provides that the inhabitants shall be admitted to the enjoyment of the privileges, rights, and immunities of citizens of the United States, declared: "This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of citizens of the United States."

In *Cross* v. *Harrison*, Mr. Justice Wayne seemed to admit by implication that it was competent for the treaty to make special regulations with respect to commerce, for he says:

> "By the ratifications of the treaty California became a part of the United States. And as there is nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage." (16 How., 197.)

In *Fleming* v. *Page*, Chief Justice Taney said:

> "The United States may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace in order to indemnify its citizens for the injuries they have suffered or to reimburse the Government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority." (9 How., 614.)

In the case of the *Mormon Church* v. *United States*, the power of the United States to make acquisitions of territory by treaty is referred to as an incident of national sovereignty. "The Territory of Louisiana," says Justice Bradley, "when acquired from France, and the Territories west of the Rocky Mountains when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the Government in its diplomatic negotiations had seen fit to accept relating to the rights of the people then inhabiting those Territories." (136 U. S., 42.)

In the case of *Geofroy* v. *Riggs* (133 U. S., 266) Mr. Justice Field declared: "The treaty power of the United States extends to all proper subjects of negotiation between our Government and the Governments of other nations."

> "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the Government or of its departments, and those arising from the nature of the Government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the Government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. (*Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U. S., 525, 541.) But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

6. THE CONCEDED POWER TO ACQUIRE TERRITORY BY TREATY OR BY CONQUEST, INCLUDES THE RIGHT TO PRESCRIBE WHAT TERMS THE UNITED STATES WILL AGREE TO IN FIXING THE FUTURE STATUS OF ITS INHABITANTS.

The United Sates may stipulate that all subjects of the ceding or conquered government shall be removed; or that certain classes of them shall remove; or that a time may be given within which those

desiring to retain their former citizenship or allegiance may declare their option to do so.

By what principle does the mere presence of a subject of the former sovereign in the ceded district entitle him to be considered a citizen of the United States? Can he be made such by operation of law against his will? Can he be made such by operation of the Constitution in spite of the treaty? If the treaty may suspend the operation of the Constitution in its own vigor long enough to permit the inhabitants to consider and decide whether they will become citizens or not, why can not it suspend citizenship forever? If one year can be properly stipulated, why not ten years, or twenty, or fifty?

The acquiring nation does not need to accept the population as its own people. If it takes the cession reserving the right to fix the status of the inhabitants of territories—is that more against established doctrine than to insist that they shall not be taken at all?

Suppose a cession of a small island with half a dozen inhabitants—must the United States agree to permit them to remain and accept them as citizens? It might be the purpose of the Government to use the island solely as a fort or military reservation.

Why should this Government be considered to have less freedom of action in this matter than other nations?

What clause of the Constitution so compels?

And if such restriction on its right to acquire exists, how does it resist the rights of uncivilized tribes in Alaska and in the Mississippi and New Mexican regions to be counted also as citizens? Or the 1,335 "free people of color" in New Orleans in 1803, to say nothing of the slaves?

The argument of Chief Justice Taney in *Scott* v. *Sandford* is that the term "people" in the Declaration of Independence and in the Federal Constitution was synonymous with citizens, and meant the same thing, and did not include the Indians nor the class of persons who had been imported as slaves, nor their descendants, *whether they had become free or not.* (19 How., 404 et seq.) And, not being citizens, they can claim none of the rights and privileges which that instrument provides for and secures to the citizens of the United States (p. 404), and had no rights or privileges but such as those who held the power and the Government might choose to grant them (p. 405), and might justly and lawfully be reduced to slavery for the benefit of the white race.

They were not embraced in the term "free inhabitants" in the Articles of Confederation, and could not be naturalized under the Federal powers of naturalization (p. 420).

The political status of native Indian tribes within territory acquired by the United States by treaty has been uniformly regarded as unaffected by the cession. A long line of special treaties with such tribes, and numerous acts of legislation by Congress on the subject of Indians and Indian rights, show that these people have always been regarded as quasi-foreign.

And the decisions of this court are to the same effect.

Cherokee Nation v. *Georgia*, 5 Peters, 17.
United States v. *Rogers*, 4 Howard, 572.
Johnson v. *McIntosh*, 8 Wheat., 574.
The Cherokee Tobacco, 11 Wall., 616.

In the case of *Elk* v. *Wilkins* (112 U. S., 101), this court declared:

> "The main object of the opening sentence of the fourteenth amendment was to settle the question, upon which there had been

a difference of opinion throughout the country and in this court, as to the citizenship of free negroes (*Scott* v. *Sandford*, 19 How., 393); and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the State in which they reside.

"This section contemplates two sources of citizenship, and two sources only—birth and naturalization—and the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth can not become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired."

In the same case, page 109, the court quote, with approval, the language of Judge Deady, of the United States district court for the district of Oregon, in the case of *United States* v. *Osborne* (6 Sawyer, 406, 409), where he said:

"But an Indian can not make himself a citizen of the United States without the consent and cooperation of the Government. The fact that he has abandoned his nomadic life or tribal relations and adopted the habits and manners of civilized people may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege which no one not born to can assume without its consent in some form. The Indians in Oregon, not being born subject to the jurisdiction of the United States, were not born citizens thereof, and I am not aware of any law or treaty by which any of them have been made so since.

"Neither are the aboriginal inhabitants of the country citizens so long as they preserve their tribal relations and recognize the headship of their chiefs, notwithstanding that, as against the action of our own people, they are under the protection of the laws, and may be said to owe a qualified allegiance to the Government. When living within territory over which the laws, either State or Territorial, are extended, they are protected by and at the same time held amenable to those laws, in all their intercourse with the body politic and with the individuals composing it; but they are also, as a quasi-foreign people, regarded as being under the direction and tutelage of the General Government, and subjected to peculiar regulations as dependent communities. They are "subject to the jurisdiction" of the United States only in a much qualified sense; and it would be obviously inconsistent with the semi-independent character of such a tribe, and with the obedience they are expected to render to their tribal head, that they should be vested with the complete rights, or, on the other hand, subjected to the full responsibilities of American citizens." (2 Story's Const., Cooley's ed., par. 1933, p. 654.)

If, therefore, it be asserted that the "inhabitants" of territory ceded by treaty become *ipso facto*, and without reference to the stipulations of the compact, citizens of the United States, by what principle were "free persons of color" in Louisiana and Florida considered as without the class of citizens? They were not excepted by the treaty;

nevertheless they were not regarded as entitled to the political privileges guaranteed by that instrument. Mr. Jefferson himself seems to have considered the "white" inhabitants alone entitled to be made citizens, as is evident from his draft of a proposed amendment to the Constitution. They owed no allegiance to any other sovereign power, and professed none.

And then, too, the Indians—by what constitutional distinction were they debarred from the operation of the privileges and immunities of citizenship under the Constitution if those privileges traveled automatically to the new "province," as Jefferson called it, and attached by their own adhesion to the "inhabitants?"

Nothing can be clearer than that the universally accepted view then was and always has been that only they are citizens who are made such by the voluntary action of the United States, expressed either in the treaty of annexation, by act of Congress, or by process of naturalization.

Experience and decision go to prove that the mere acquisition of territory does not confer political rights upon the inhabitants; that the Government can not be made to receive people as citizens except by its consent and cooperation; while it may acquire territory and thereby sovereignty over the inhabitants without admitting them to the status of citizens of the United States.

The privileges of citizenship under our Constitution do not arise out of our ownership of the lands, nor out of the fact of national sovereignty over the inhabitants, notwithstanding they owe allegiance to the Government. Citizenship arises only from birth within the United States or from naturalization, the former being a condition allowed by the Constitution and the latter one permitted or denied at the will of Congress or the treaty-making power.

Of course, persons born in Spanish territory and under Spanish jurisdiction, though it be afterwards acquired by the United States, are not "born in the United States," for these words relate to the time of birth. (*Elk* v. *Wilkins*, *supra*.)

It must be birth within the allegiance. (*United States* v. *Wong Kim Ark*, 169 U. S., 655.)

The rule of international law applicable to the inhabitants of territory transferred from one sovereignty to another is stated by Halleck:

> "The transfer of territory establishes its inhabitants in such a position toward the new sovereignty that they may elect to become or not to become its subjects. Their obligations to the former government are canceled, and they may or may not become the subjects of the new government, according to their own choice. If they remain in the territory after this transfer, they are deemed to have elected to become its subjects, and thus have consented to the transfer of their allegiance to the new sovereignty. If they leave, *sine animo revertendi*, they are deemed to have elected to continue aliens to the new sovereignty. The *status* of the inhabitants of the conquered and transferred territory is thus determined by their own acts. This rule is the most just, reasonable, and convenient which could be adopted. It is reasonable on the part of the conqueror, who is entitled to know who become his subjects and who prefer to continue aliens; it is very convenient for those who wish to become the subjects of the new state, and is not unjust toward those who determine not to become its subjects. According to this rule *domicile*, as understood and defined by public law,

determines the question of transfer of allegiance, or, rather, is the rule of evidence by which that question is to be decided." (Halleck's International Law, vol. 2, sec. 7, p. 475, 3d ed.)

It is at the option of the inhabitants whether or not they will become subjects of the new sovereign (assuming that no expatriation is demanded), but it is at the option of the sovereign whether they shall become citizens or not.

In *United States* v. *De Repentigny* (5 Wall., 260), it was expressly laid down as a rule of public law that the conqueror, who shall obtain permanent possession of the enemy's country, has the right to forbid the departure of his new subjects or citizens from it, and to exercise his sovereign authority over them.

Hall, in his *Treatise on International Law* (4th ed., 1895, p. 593), declares one of the effects of a conquest to be "to invest the conquering State with sovereignty over all subjects of a wholly conquered State and over such subjects of a partially conquered State as are identified with the conquered territory at the time when the conquest is definitively effected, so that they become subjects of the State and are naturalized *for external purposes, without necessarily acquiring the full status of subjects or citizens for internal purposes.*"

The effects of a cession by a treaty concluded on the basis of *uti possidetis*, and of conquest upon the inhabitants of territory which changes hands at the conclusion of a war, are identical. (Idem, p. 593, par. 206.)

It has been usual in treaties to insert provisions regarding the future political status of the inhabitants, and securing to them their property rights, and in some instances certain immunities and privileges. A common provision of this kind is one securing liberty to the inhabitants of the ceded territory to retain their nationality of origin.

The appropriateness of thus regulating by treaty the rights and status of the inhabitants may be said to be now universally recognized and followed by all civilized powers.

The power of the United States to make by treaty the stipulations upon this subject common to other nations is one flowing out of its national sovereignty, and is not restrained by any express language of the Constitution or by any implication from any provision contained in that instrument.

Hence, we find in every treaty by which the United States has acquired territory the rights and status of the inhabitants have been, to some extent, regulated and provided for, but not by a uniform method, but with extreme variance, indicating that the Presidents and Senates were acting in the belief that this Government possessed in this respect all the powers of any other nation.

"*Louisiana.*—The inhabitants to be incorporated in the Union of the United States and admitted *as soon as possible* * * * to the enjoyment of all the rights, advantages, and immunities of citizens of the United States.

"*Florida.*—Identical with Louisiana.

"*Mexico.*—Mexicans who did not elect to retain their former citizenship should be incorporated into the Union and be admitted *at the proper time* (not immediately, *proprio vigore* of the treaty), to be judged of by the Congress of the United States, to the enjoyment of all the rights of citizens of the United States.

"*Alaska.*—The inhabitants who remain three years, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, etc., of citizens of the United States.

"*Porto Rico.*—Allows one year for Spaniards to elect to retain former citizenship, and provides that the civil status and political rights of the native inhabitants shall be determined by the Congress."

The treaty-making power of the Government has therefore exercised the right to deal with the status of the inhabitants of ceded territory in every treaty of cession from 1803 to 1898. The status fixed has not been uniform, but exceedingly varying.

The inhabitants of Louisiana and Florida were to be admitted to citizenship "*as soon as possible*," not immediately, but at a later date, impliedly to be fixed by Congress. But it has never been considered that this included *all* the inhabitants, but only the free inhabitants, and excluded the Indian tribes, though not so expressed.

The inhabitants of New Mexico and California were to be admitted to citizenship "*at the proper time*," not immediately, but at a proper time "*to be judged of by the Congress.*"

Alaskans who remained three years were admitted without further action by Congress or otherwise, but native tribes were excepted.

We find, therefore, great and varying discriminations in the treaties on this subject. No one of them admits all the inhabitants. None admits the inhabitants to immediate citizenship.

Those that guarantee citizenship to certain classes of the inhabitants—Louisiana, Florida, New Mexico, and California—do not grant it at once, but leave the declaration or promise of the treaty to be performed by the Congressional act at a future day; "as soon as possible;" "at the proper time;" "to be judged of by the Congress."

This course of dealing with the inhabitants of ceded territory in the treaty of cession establishes beyond question that the Presidents and the Senates have always believed that the status of such inhabitants was a subject which could properly and constitutionally be settled by the treaty itself or referred to the subsequent action of Congress.

Such a practice is absolutely opposed to the doctrine that "the Constitution follows the flag," and that when territory is ceded to the United States the inhabitants become immmediately *proprio vigore* citizens of the United States. If that doctrine be true, every treaty that has brought us new lands and new inhabitants has violated in this respect the principles of the Constitution. It convicts of error and usurpation Thomas Jefferson, James Madison, James Monroe, James K. Polk, Franklin Pierce, Andrew Johnson, their Cabinets, and the Senates that ratified their treaties.

Not only are the Executive and the Senatorial divisions of the Government committed to an unvarying practice of policy which is opposed to this false doctrine, but the whole Congress, Senate and House of Representatives, as a legislative body, have indorsed and followed the practice and tenet of the Executive by passing laws in furtherance and recognition of the treaty provisions referred to, and by the adoption during a hundred years of legislation of numerous acts extending the Constitution and various laws of the United States to ceded territory.

How is this doctrine to be reconciled with the exclusion of Indian tribes from citizenship, notwithstanding they are inhabitants of ceded country?

There is no constitutional prohibition against accepting red men as citizens. Once admit the right of the treaty-making power or of Congress to discriminate as to a single one of the inhabitants and you have admitted their right to discriminate to the fullest extent.

Under what clause of the Constitution is a white inhabitant entitled to immediate citizenship and a red man or black man not?

By what warrant of the Constitution do the treaties suspend the rights or obligations of immediate citizenship in the cases of inhabitants who desire time to elect whether they will remain Mexicans, or Russians, or Spaniards?

If citizenship follows instanter upon the ratification of the treaty by the mere operation of the Constitution, then it is not in the power of the treaty to arrest it for a single moment, nor to make it a condition that the inhabitants shall renounce allegiance to their former sovereign.

If Congress may properly define the classes of emigrant or aboriginal inhabitants who may become citizens, and the proper period of probation and the terms and conditions of admission, why is it unreasonable or unjust to leave to their judgment and discretion the time, the terms, and the conditions upon which the inhabitants of lately foreign islands may be admitted to the same high status?

Are the United States so bound and tied by this Constitution of ours that it can never acquire an island of the sea, a belt across the Isthmus, a station for a naval base, unless it be at the cost of admitting those who may happen to inhabit the soil at the time of the purchase to full rights as citizens of the Union, no matter how incongruous or unfit they may be, while the foreign-born inhabitant or the aboriginal red man must depend upon the grace of Congress, though he dwell half a century among us?

An independent nation might find it necessary or expedient to demand and receive a cession of conquered territory subject to a great variety of conditions, some of which we can now foresee and state, and others of which, in accordance with the varying changes in the world's condition in the course of events, may be unforeseen. It might be prudent to demand a conditional cession of territory by way of security for payment of indemnity for the cost of a war. It might be found necessary to take possession of a part of territory temporarily, in order to collect and apply the revenues, or a part thereof, for the benefit of the conqueror until the indemnity is paid. Under the usual powers of national sovereignty, an independent government would have an undoubted right to resort to such a device, if advisable, and the territory would not thereby become a part of the acquiring nation.

It might be necessary or prudent, on account of international reasons, to agree that the ports of ceded territory should remain subject to special provisions or privileges granted by the ceding nation to other powers. It might be the case that the revenues are pledged to other nations as security for bonds, and it might be found expedient to affirm such an arrangement where it could not be disaffirmed without danger of foreign war or entanglements.

It might be found desirable to take over by cession a port or a country for a limited period, or for special purposes, as, for instance, the grounding of a cable or the construction of a canal across the Isthmus of Panama.

What reason can be suggested for denying to this nation such full power and discretion as are possessed by other nations in this respect?

Why should the framers of the Constitution have wished to put shackles on the national limbs, or to strip the nation of powers necessary to the preservation of its dignity and the maintenance of its material interests on an equality with the nations of the earth? The full exercise of these ordinary powers tends to the exaltation of the dignity, influence, and welfare of the Union. These powers are inconsistent with no principle of personal liberty. Why seek to needlessly limit and restrain the national functions? Why not rather, with the same largeness of view and purpose that characterized such statesmen as Jefferson and Marshall, seek, by liberal interpretation, to give broad and ample scope to the spirit of national development, looking forward, as Marshall expressed it, "to the ages to come," when newer, grander, and more potential opportunities for national growth and influence should have come to us than our fathers ever dreamed of?

It is within the undisputed power of our Government to exclude from its territory such aliens as it may deem undesirable. Why is it not equally within its power to define what persons may become citizens by cession of territory? What constitutional principle is violated?

What is there in the Constitution which differentiates this country from all others in the exercise of the right of territorial acquisition so as to bind us not to extend our possessions except upon the necessity of extending our citizenship? Is it answered that by the spirit of our institutions a republic can not have subjects who are not also citizens? The proposition is denied. And the counter question is retorted, Why not?

To be called an American subject is no disgrace. The term does not imply anything as to the nature or form of the goverment of which one is a subject. It imports only that a person is within the protection and allegiance—either permanent or temporary—of a particular sovereignty; it may be imperial or it may be republican. It does not signify in any degree the grade or status of citizenship occupied by the person within the domestic economy of his sovereign. Kent says:

> "We are, equally with the inhabitants of all other countries, *subjects*, for we are equally bound by allegiance and subjection to the government and law of the land." (2 Kent Com., 258, note.)

A subject is one under the protection of a government and owing it allegiance. This may be a complete and exclusive allegiance or a paramount allegiance, there remaining a subordinate allegiance to some subordinate sovereignty, as in the case of Indian tribes; or it may be only a temporary allegiance, as in the case of an alien emigrant not yet naturalized. The correlative of allegiance is not citizenship, but protection. Citizenship may be taken away as a penalty for crime, but allegiance is still due. The noncitizen subject may be constitutionally taxed. No one suggests that alien residents are not subject to our tax and revenue statutes. Indians living in tribal relations may be subjected to their operation, or they may be exempted, at the pleasure of Congress. (*The Cherokee Tobacco*, 11 Wall., 616.)

In an international sense subjects are the same as citizens, but in a domestic sense they may be entirely different.

The Constitution recognizes "persons" as well as citizens, but it confers privileges upon citizens which it denies to persons who are not

citizens, and it confers certain rights or capacities upon some classes of citizens that are denied to others. It distinguishes between native-born and foreign-born citizens in prescribing qualifications for certain offices. So that citizenship is not in all respects necessary to secure to persons in the United States certain of the immunities granted by the Constitution; while, on the other hand, citizenship does not carry with it the right to enjoy *all* the privileges which some American citizens may enjoy.

To those who contend that the duty of allegiance can be exacted by the United States from citizens alone, and to those who ask if the inhabitants of Porto Rico can commit treason if they be not citizens, let John Marshall answer.

Discussing the "Act for the punishment of certain crime against the United States" (1 Stat., 112), he declared:

> "The first section relates to treason, and its objects are: 'Any person or persons owing allegiance to the United States.' This description comprehends only the citizens of the United States, *and such others as may be on its territory or in its service.*" (5 Wheat. Appendix, p. 12.)

III.

ADMINISTRATIVE CONSTRUCTION, CONGRESSIONAL ACTION, AND JUDICIAL PRECEDENT, ALL AFFIRM THAT UNDER OUR REVENUE LAWS EVERY PORT IN A CEDED COUNTRY IS TO BE REGARDED AS A FOREIGN ONE UNTIL SUCH LAWS ARE EXPRESSLY EXTENDED BY CONGRESS TO THE NEW POSSESSIONS.

The theory and opinion of the earliest rulers and statesmen of the Union appear to have been that general laws for the government of the United States were intended to apply only to the States united, unless otherwise expressed therein.

It is a maxim that laws enacted by the legislature of any State or municipality bind only the inhabitants of such State or municipality. They have no extraterritorial effect or jurisdiction. So also of constitutional provisions. We search in vain through the Constitution and the first twelve amendments to find a single phrase or word indicating that that instrument was to have operation beyond the confines of the Union. But when we turn to the thirteenth amendment we find a variation of language and an extension of operation which is most remarkable and significant.

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, *or any place subject to their jurisdiction.*"

The clear significance of this language is that there may be territory pertaining to and under the jurisdiction of the United States which is not a part of the United States and to which the Constitution of the United States does not apply unless it be expressly made to apply thereto, as in the case of slavery.

1. ADMINISTRATIVE AND LEGISLATIVE INTERPRETATION.

Rhode Island and North Carolina.—The historical precedents began with the very establishment of the Union under the Constitution. On

July 26, 1788, eleven States had ratified that instrument, more than the requisite number under the seventh article. North Carolina and Rhode Island stood aloof, the first until November 2, 1789, and the latter until May 29, 1790.

While thus standing outside the Union, of course these States were in the position of foreign states, and as such regulated their own commerce and customs.

But when they ultimately assented to the Constitution and came into the Union, acts of Congress were passed extending, not the Constitution, but the revenue laws over them. (1 Stat. L., p. 99, 126.)

Vermont.—Vermont was admitted into the Union as a State February 18, 1791. Congress, however, considered it necessary to pass a subsequent act which declared "that from and after the 3d day of March next" (not instanter) "all the laws of the United States which are not locally inapplicable ought to have and shall have the same force and effect within the State of Vermont as elsewhere within the United States."

This general extension was, however, considered insufficient, so far as the customs and tonnage act was concerned, and so the bill expressly provided (section 7) that that act "may be carried into effect in the said State of Vermont."

Vermont had, prior to its admission as a State, been a part of the territory belonging to the United States. If the revenue laws were applicable to the Territory of Vermont *proprio vigore*, it was an act of supererogation to extend them to the State.

Louisiana.—The views of President Jefferson and his Secretary of the Treasury Gallatin are disclosed in their correspondence and the orders given to Governor Claiborne.

All the declarations of Jefferson on this subject are to the effect that in order to come under the operation of the laws of the United States those laws must be explicitly extended to new acquisitions.

He selects certain acts to be immediately extended, and others to be extended from time to time as may be found practicable.

Writing to Gallatin, his Secretary of the Treasury, on the subject of Louisiana, on November 9, 1803, he expressed the following views with reference to the administration of the government of Louisiana, and as to the subjects upon which Congress, in legislating for the Territory, should act:

> "The memoranda you inclosed me from Mr. Clarke deserve great attention. Such articles of them as depend on the Executive shall be arranged for the next post. The following articles belong to the legislature:
>
> "The administration of justice to be prompt. Perhaps the judges should be obliged to hold their courts weekly, at least for some time to come.
>
> "*The ships of resident owners to be naturalized, and in general the laws of the United States, respecting navigation, importation, exportation, etc., to be extended to the ports of the ceded territory.*
>
> "The hospital to be provided for.
>
> "Slaves not to be imported, except from such of the United States as prohibit importation.
>
> "Without looking at the old territorial ordinance, I had imagined it best to found a government for the territory or territories of *lower* Louisiana on that basis. But on examining it, I

find it will not do at all; that it would turn all their laws topsy-turvy. Still I believe it best to appoint a governor and three judges, with legislative powers; only providing that the judges shall form the laws, and the governor have a negative only, subject further to the negative of a national legislature. The existing laws of the country being now in force, the new legislature will of course introduce the trial by jury in *criminal* cases, first; the habeas corpus, the freedom of the press, freedom of religion, etc., *as soon as can be*, and in general draw their laws and organization to the mold of ours *by degrees* as they find practicable without exciting too much discontent. In proportion as we find the people there riper for receiving these first principles of freedom, Congress may from session to session confirm their enjoyment of them." (Writings of Jefferson, vol. 8, 275.)

Gallatin, writing to Jefferson July 9, 1803, stated as his opinion that "all the duties on exports now payable at New Orleans by Spanish laws should cease, and all articles the growth of Louisiana which when imported into the United States now pay duty should continue to pay the same for at least such rates as would on the whole not affect the revenue." (Writings of Gallatin, compiled by Henry Adams, vol. 1, p. 127.)

Writing to Governor Claiborne, who was about to start for his new post as governor of the new province, Gallatin instructed him, under date of October 31, 1803: "It is understood that the existing duties on imports and exports which by the Spanish law are now levied within the province will continue until Congress shall have otherwise provided." (Writings of Gallatin, vol. 1, p. 167.)

The treaty with France by which Louisiana was ceded to the United States was ratified by the Senate at a special session of the Eighth Congress, convened October 17, 1803. On November 31 following, Congress passed an act—the first of that session—for enabling the President to take possession of the ceded territory and for the temporary government thereof. This act directed that all military, civil, and judicial powers exercised by the officers of the existing government of Louisiana should be vested in such person and persons and should be exercised in such manner as the President of the United States should direct for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property, and religion.

On November 10, an act was passed authorizing the creation of a stock for the purpose of making payment to France of the purchase money of Louisiana.

On February 24, 1804, Congress passed an act for laying and collecting duties on imports and tonnage within the Louisiana Territory. This provided that the same duties which by law now are or hereafter may be laid on goods, wares, and merchandise imported into the United States, on the tonnage of vessels, and on the passports and clearances of vessels, shall be laid and collected on goods, wares, and merchandise imported into the territory ceded to the United States by the treaty of April 30, 1803, etc. By the same act certain statutes relating, among other things, to the registering and recording of ships, to the collection of duties on imports and tonnage, etc., were extended to and declared to have full force and effect in the above-mentioned territory. The territory was annexed to the collection district of Mississippi, and

New Orleans was made the port of entry. To carry out the stipulation of the treaty this act further provided that during the term of twelve years French and Spanish ships coming directly from France or from her colonies ladened only with the produce of manufactures of France or Spain, as the case might be, should be admitted into the ports of said Territory on payment of like duties with ships of the United States carrying similar articles imported from France or Spain.

On March 26, 1804, Congress passed an act erecting Louisiana into two Territories, and providing for the temporary government thereof. All the southern portion of the province, below the line which now forms the boundary between the States of Louisiana and Arkansas, was called the Territory of Orleans. The legislative powers were vested in the governor and a legislative council of thirteen members, to be appointed annually by the President from among those holding real estate in the Territory. The legislature was prohibited from passing any act which should lay any person under restraint, burden, or disability on account of his religious opinions, professions, or worship.

The act contained a bill of rights, as follows:

> "In all criminal prosecutions which are capital the trial shall be by a jury of twelve good and lawful men of the vicinage, and in all cases, criminal and civil, in the superior court, the trial shall be by jury if either of the parties require; the inhabitants of the ceded territory shall be entitled to the benefits of the writ of *habeas corpus;* they shall be bailable unless for capital offenses, where the proof shall be evident or the presumption great; and no cruel or unusual punishment shall be inflicted."

Section 7 extended various acts of Congress to the Territories.

Section 11 provided:

> "The laws in force in ceded territory at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force until altered, modified, or repealed by the legislature."

The treaty for the purchase of Louisiana was formulated April 30, 1803, approved by the Senate in October, 1803, ratified and exchanged by the President October 21, 1803.

On October 25, 1803, Gallatin, as Secretary of the Treasury, submitted a "Report on the Finances." Therein he said:

> "The existing surplus revenue of the United States will, as has been stated, be sufficient to discharge $600,000 of that sum, and it is expected that the net revenue collected at New Orleans will be equal to the remaining $200,000. That opinion rests on the supposition that Congress shall place that port on the same footing as those of the United States, so that the same duties shall be collected there on the importation of foreign merchandise as are now by law levied in the United States, and that no duties shall be collected, either on the exportation of produce or merchandise, from New Orleans to any other place, nor on any articles imported in the United States from the ceded territories, or into those territories from the United States." (Vol. 1, Reports on Finances, p. 265, U. S. Treasury.)

It is manifest that Gallatin considered that *Congress* must *legislate* in order that "no duties shall be collected * * * on any articles

imported in the United States from the ceded territories, or into those territories from the United States."

Gallatin wrote to W. C. Claiborne, governor of the Mississippi Territory, as follows:

"WASHINGTON, *31st October, 1803.*

"DEAR SIR: You will receive by this mail instructions from the proper department for taking possession of Louisiana, and for the temporary government of the province. It is understood that the existing duties on imports and exports, which by the Spanish laws are now levied within the province, will continue until Congress shall have otherwise provided. By next mail I expect to be able to write you an official letter on that subject which will probably reach you before you can act upon it." (Writings of Gallatin, vol. 1, p. 167.)

Thereafter H. R. Trist, United States collector at Fort Adams, was designated as collector of the port of New Orleans. On November 14, 1803, Gallatin, as Secretary of the Treasury, issued an order directed to Mr. Trist wherein, after informing him of his new appointment, he instructed him as follows:

"You will also be pleased to observe—

"First. That the taxes and the duties to be collected under your direction are precisely the same which by the existing laws or regulations of Louisiana were demandable under the Spanish Government at the time of taking possession.

"Second. That in those taxes and duties are included specially those on imports, exports, transfer of shipping, etc., which were collected under those officers whose powers are vested in you and generally all other taxes and duties which made part of the general revenue of the province.

* * * * *

"Fourth. That you are only to secure or collect duties accruing after possession of same by the United States.

* * * * *

"10. That until otherwise provided for, the same duties are to be collected on the importation of goods in the Mississippi district from New Orleans and vice versa as heretofore." (Gallatin to Trist, November 14, 1803. See Book "G," January 1, 1803, to December 31, 1808, Collectors Small Ports, Office Secretary of Treasury.)

On February 24, 1804, Congress passed an act putting in force in the Territory of Louisiana the laws of the United States regulating duties on imports and tonnage. (2 U. S. Stats., p. 251.)

Congress accepted the doctrine acted upon by the Jefferson Administration, and included in said act the following:

"SEC. 3. *And be it further enacted*, That so much of any law or laws laying any duties on the importation into the United States of goods, wares, and merchandise from the said Territories (or allowing drawbacks on the importation of the same from the United States to the said Territories), or respecting the commercial intercourse between the United States and the said Territories, or between the several parts of the United States through

the said Territories, which is inconsistent with the provisions of the preceding section, *be, and the same hereby is, repealed;* and all duties on the exportation of goods, wares, and merchandise from the said Territories, as well as all duties on the importation of goods, wares, and merchandise into the said Territories, on the transfer of ships or vessels, and on the tonnage of vessels, other than those laid by virtue of the laws of the United States, shall, from the time when this act shall commence to be in force, *cease and determine: Provided, however*, That nothing herein contained shall be construed to affect the fees and other charges usually paid in the said Territories on account of pilotage, wharfage, or the right of anchorage by the levy of the city of New Orleans, which several fees and charges shall, until otherwise directed, continue to be paid and applied to the same purposes as heretofore." (2 U. S. Stats., sec. 3, p. 255.)

Section 12 of said act provided "that this act shall commence thirty days after the passing thereof." (Id., p. 254.)

Thereupon Gallatin, Secretary of the Treasury, issued the following:

[Circular.]

TREASURY DEPARTMENT,
February 28, 1804.

"SIR: As it may be some time before you can be furnished with a printed copy of an act entitled "An act for laying and collecting duties on imports and tonnage within the territories ceded to the United States by the treaty of the thirtieth of April, one thousand eight hundred and three, between the United States and the French Republic, and for other purposes," passed on the 24th of the present month, I have deemed it proper, for your government therein, to inform you that by the third section of the said act so much of any law or laws imposing duties on the importations into the United States of goods, wares, and merchandise from New Orleans, which is the only port of entry in the said territories, has been repealed. But as the act in question does not commence to be in force until thirty days after its date, articles which have been or may be thus imported before the 25th of March ensuing *must pay the same duties as heretofore.*

"I am, very respectfully, sir, your obedt. servt.

"A. GALLATIN."

(Book "G," January 1, 1803, to December 31, 1808, Collectors of Small Ports, Office Secretary of Treasury.)

Regarding the construction of this repealing act, Gallatin determined as follows:

"TREASURY DEPARTMENT,
"*March 31, 1804.*

"ROBERT PURVEANCE, Esquire,
"*Collr., Baltimore.*

"SIR: In answer to your letter of the 29th inst., I will only observe that, without wishing to establish a principle applicable to other places, it seems proper that the law repealing duties on goods imported from New Orleans should receive a liberal con-

struction and that no duties should be collected which are not in the most liberal sense of the law justly demandable.

"In the case of the *Comet*, the day of arrival in the district where the goods are entered appears to be the proper date of importation. If, therefore, the vessel arrived in the district of Baltimore subsequent to the 25th of March, I do not think that the goods which, by law, are exonerated from payment of duty if imported after that day into the United States should be charged with such duty.

"I am, very respectfully, sir, your obedt. servt.,

(Signed) "ALBERT GALLATIN."

(G. January 1, 1803, to December 31, 1808. Collectors small ports. Office Secretary of Treasury.)

Jefferson claimed West Florida was included in the Louisiana purchase. Inasmuch as Congress had extended the tariff and navigation laws of the United States over the "territories ceded to the United States" by said treaty, it was necessary for him to accord the benefits of said laws to the products and shipping of West Florida; but his Secretary of the Treasury instructed the collector of the port of New Orleans as follows:

"You will therefore consider all the said territory, whether on Lake Pontchartrain or on the Mississippi, in the same light as that part of it which lies east of the P. Lake; that is to say, that, with the exception prescribed in the two first rules laid down in my letter of the 27th ulto. in relation to the produce and shipping of the said disputed territory, you are to consider Baton Rouge and other settlements now in possession of Spain, whether on the Missi., Iberville, the Lakes, or the sea coast, *as foreign ports.*"

(See letter Gallatin to Trist, March 19, 1804, Book "G," January 1, 1803, to December 31, 1808, collectors of small ports, office Secretary of Treasury.)

In December, 1806, Gallatin, as Secretary of the Treasury, submitted a "Report on the finances." Included therein was his estimate of the probable revenues to be derived by the Government for the ensuing nine years. In concluding that portion of his report, Gallatin says:

"And this must be considered as a very moderate computation, *since it does not include the revenue derived from New Orleans.*"

(Vol. 1, Reports on the Finances, p. 335, U. S. Treasury.)

Evidently Gallatin considered that territory as something separate and apart from the United States.

The act of February 24, 1804, entitled "An act for laying and collecting duties on imports and tonnage within the territories ceded to the United States by the treaty of the 30th of April, 1803, between the United States and the French Republic," contained the following:

"SEC. 8. *And be it further enacted*, That during the term of twelve years, to commence three months after the exchange of the ratifications of the above-mentioned treaty shall have been notified, at Paris, to the French Government, French ships or vessels, coming directly from France, or any of her colonies, laden only with the produce or manufactures of France, or any of her said colonies; and Spanish ships or vessels, coming directly from Spain,

or any of her colonies, laden only with the produce or manufactures of Spain, or any of her said colonies, shall be admitted into the port of New Orleans, and into all other ports of entry which may hereafter be established by law, within the territories ceded to the United States by the above-mentioned treaty, in the same manner as ships or vessels of the United States, coming directly from France or Spain, or any of their colonies, and without being subject to any other, or higher duty on the said produce or manufacture, than by law now is, or shall, at the time, be payable, by citizens of the United States on similar articles, imported from France or Spain, or any of their colonies, in vessels of the United States, into the said port of New Orleans, or other ports of entry in the territories above mentioned; or to any other, or higher tonnage duty, than by law now is, or shall at the time be, laid on the tonnage of vessels of the United States coming from France or Spain, or from any of their colonies, to the said port of New Orleans, or other ports of entry within the territories above mentioned." (2 U. S. Stats. 253.)

The provisions of this section gave New Orleans an advantage in the importation of French and Spanish products over all the ports of the States of the Union. Such advantage could only be justified upon the theory that the port at New Orleans was without the limits wherein the Constitution required that duties should be uniform.

Attention is also directed to certain legislation of Congress relating to the United States Bank and Louisiana. The original charter of the bank authorized the directors to establish branch banks "wheresoever they shall see fit within the United States." (Act Feb. 25, 1791, 1 U. S. Stats., sec. 15, p. 195.)

Upon the acquisition of Louisiana the bank desired to establish a branch in New Orleans. To enable it to do so Congress passed the following act:

AN ACT supplementary to the act intituled "An act to incorporate the subscribers to the Bank of the United States."

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the president and directors of the Bank of the United States shall be, and they are hereby, authorized to establish offices of discount and deposit in any part of the territories *or dependencies* of the United States, in the manner and on the terms prescribed by the act to which this is a supplement.

"Approved March 23, 1804." (2 U. S. Stats., p. 274.)

The Constitution requires that—

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." (Art. 4, sec. 1.)

The First Congress (1790) passed an act providing—

"That the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court *within the United States* by the attestation * * * . And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court *within the United States* as * * * ." (Act of May 26, 1790, 1 U. S. Stats., p. 122.)

When the province of Louisiana was acquired it was of course necessary to secure a like recognition in that territory for such public acts, records, and judicial proceedings.

To accomplish this the Eighth Congress (1804) passed "An act *supplementary* to the act intituled," etc., being the act above referred to. This act specifically divided all territory under the sovereignty of the United States into three classes, as follows:

(1) States of the Union.
(2) Territories of the United States.
(3) Countries subject to the jurisdiction of the United States.

This classification appears in section 2 of said act, which is as follows:

> "That all the provisions of this act, and the act to which this is a supplement, shall apply as well to the public acts, records, office books, judicial proceedings, courts, and offices of the respective *Territories* of the United States, and *countries subject to the jurisdiction* of the United States, as to the public acts, records, office books, judicial proceedings, courts, and offices of the several *States*." (Act of March 27, 1804, 2 U. S. Stats., pp. 298, 299.)

This classification, adopted by the Eighth Congress and approved by President Jefferson, is preserved to this day. Sections 905 and 906, Revised Statutes of the United States (1878), are as follows:

> "905. The acts of the legislature of any State or Territory, *or any country subject to the jurisdiction of the United States*, etc.
>
> "906. All records and exemplifications of books which may be kept in any public office of any State or Territory, *or any country subject to the jurisdiction of the United States*," etc.

Florida.—The fifteenth article in the Florida treaty was as follows:

> "The United States, to give to His Catholic Majesty a proof of their desire to cement the relations of amity subsisting between the two nations, and to favour the commerce of the subjects of His Catholic Majesty, agree that Spanish vessels, coming laden only with productions of Spanish growth or manufacture, directly from the ports of Spain, or of her colonies, shall be admitted, for the term of twelve years, to the ports of Pensacola and St. Augustine, in the Floridas, without paying other or higher duties on their cargoes, or of tonnage, than will be paid by the vessels of the United States. During the said term no other nation shall enjoy the same privileges within the ceded territories. The twelve years shall commence three months after the exchange of the ratifications of this treaty."

The advantage over the ports of the several States of the Union thus stipulated for Pensacola and St. Augustine, was rendered effective by the act of March 3, 1821, by which the treaty was carried into effect. Section 2 thereof provided that—

> "The laws of the United States relating to the revenue and its collection, subject to the modification stipulated by the fifteenth article of the said treaty, in favor of Spanish vessels and their cargoes * * * shall be extended to said territories." (3 U. S. Stat., p. 639.)

Here again we find both the Executive and the Senate, in exercising the treaty-making power, and the Congress, in legislating for terri-

tory not included in the boundaries of the several States, dealing with said territory as being without the area covered by constitutional requirements for equality of duties.

It also presents another instance where Congress and the Executive considered it necessary for Congress to act in order that the revenue laws of the United States should be extended to newly acquired territory.

It appears that in 1819, after the Florida treaty had been concluded, but prior to ratification and exchange, a question arose in relation to exports from Florida into New Orleans, and the Treasury Department decided—

> "That all goods which have been or may be imported from Pensacola before an act of Congress shall be passed, erecting it into a collection district, and authorizing the appointment of an officer to reside thereat, for the purpose of superintending the collection of duties, will be liable to duty."

(NOTE.—I am unable to secure a copy of this circular, although search has been made therefor at the Treasury Department. The statement of fact and quotation are derived from the circular issued by the Treasury Department on July 29, 1845, with reference to Texas, as set forth in this memorandum under the heading "Tariff in Texas.")

When the United States acquired East and West Florida, the Louisiana law was taken for a model and the government of Florida was the same as had been that of Louisiana. (3 Stats., p. 637.) Monroe was President and followed Jefferson's example.

When the Florida bill was pending in Congress, an amendment was offered providing as follows:

> "That all the principles of the United States Constitution, for the security of civil and religious freedom, and for the security of property, and the sacredness of rights to things in action; and all the prohibitions to legislation, as well as with respect to Congress as the legislatures of the States, be, and the same are hereby declared to be, applicable to the said Territory, as paramount acts." (Annals of Congress, first session Seventeenth Congress, vol. 2, p. 1374.)

In opposing this amendment, Mr. Rhea, of Tennessee, speaking for the Administration, said:

> "The people of Florida, (except citizens of the United States who may have removed there either temporarily or permanently) know little of our Constitution and laws; to these they are strangers. Many principles of the Constitution of the United States require laws of the United States to carry them into operation. * * * That the Constitution of the United States shall obtain and have full force and effect in a territory not included within the bounds and limits of the territories of the old thirteen States, or either of them, but which has been acquired by treaty from any foreign power since the adoption of that Constitution, and that the inhabitants of such territory shall be entitled to all the rights, privileges, and immunities sanctioned and confirmed by the Constitution to citizens of the United States, it appears necessary and consistent with the Constitution of the United States that the sovereign people shall, by the Congress of the United

States, enact laws preparatory to and declaratory of the admission of such territory to a participation of the rights, etc., derived from the Constitution, and afterwards to be admitted a State of this Union on the same footing as one of the original thirteen States; the people of such new State will then have their full representation in both Houses of the Congress of the United States, and then the Constitution of the United States is in full operation in and over such new State, as it is in one of the original States." (Ib., p. 1375.)

The amendment was then voted down. Next an amendment was offered to authorize the people of Florida to elect their legislative council. This amendment received only 15 votes, and was lost. (Ib., p. 1377.)

The bill passed without amendment and was approved by President Monroe. The following is Benton's comment on the incident:

"This prompt rejection of Mr. Montgomery's proposition shows what the Congress of 1822 thought of the right of Territories to the enjoyment of any part of the Constitution of the United States. * * * The only question between Mr. Montgomery's proposition and the clause already in the bill was as to the tenure by which these rights should be held—whether under the Constitution of the United States or under a law of Congress and the treaty of cession. And the decision was that they should be held under the law and the treaty. Thus a direct issue was made between constitutional rights on one hand and the discretion of Congress on the other in the government of this Territory, and decided promptly and without debate (for there was no speech after that of Mr. Rhea on either side) against the Constitution. It was tantamount to the express declaration: 'You shall have these principles which are in the Constitution, but not as a constitutional right, nor even as a grant under the Constitution, but as a justice flowing from our discretion, and as an obligation imposed by the treaty which transferred you to our sovereignty.'" (Benton's Abridgment, vol. 7, p. 295, note.)

Andrew Jackson, then a major-general, was appointed governor of Florida under this bill, and authorized by the President to exercise all the powers heretofore possessed by the Spanish governors of East and West Florida, and in addition the powers of the captain-general of Cuba and the intendant of Cuba. Jackson went to Florida and proceeded to exercise these powers in a style for which he is still famous. As a legislature he enacted many laws, some of which were afterwards repealed by Congress; as the supreme court and chancellor of the Territory he heard and determined many cases both in law and in equity, and as chief executive or governor he extended his authority to issuing orders expelling certain inhabitants from the Territory.

Shortly after Jackson assumed control, a matter arose which squarely raised the question as to whether the Constitution was applied automatically to Florida.

Jackson learned that a Spanish military officer named Sousa had in his possession and refused to surrender certain documents relating to the claims of a private citizen to an estate. Jackson issued an order requiring the delivery of said documents to the American authorities. Instead of complying with the order, Sousa consulted the commander

of the Spanish forces, Colonel Callava, who instructed him to turn over said documents to the steward of the colonel's household, which instruction was obeyed. When Jackson learned of this, he caused the three Spanish officers to be seized and thrown into prison, searched the house of the colonel, and found and retained the documents. This action caused a sensation, and a great crowd of people marched to the residence of Judge Fromentin, the United States judge of the Territory, to whom application was made for a writ of *habeas corpus*. The United States judge issued the writ. When the writ was served, Jackson refused obedience to it on the ground that Congress had not extended the Constitution and laws of the United States to Florida. He also ordered Judge Fromentin to appear before him for contempt. The judge insisted that the inhabitants of Florida were entitled to the writ of *habeas corpus* by virtue of the treaty which guaranteed them the privileges and immunities of American citizens, and also because he thought the Constitution and laws of the United States were in force in Florida. In reporting this to the President, Jackson says:

> "If it be not sufficient to strike him from the roll of judges, I must say that ignorance of law is no objection against anyone's holding a judicial station. Judge Fromentin was represented to me to be no lawyer, * * * but I could not have formed such an idea of his want of legal knowledge as this transaction displays." (Annals of Congress, first session Seventeenth Congress, vol. 2, p. 2300.)

In the same report Jackson also says:

> "The lecture I gave the judge when he came before me will, I trust, for the future, cause him to obey the spirit of his commission, aid in the execution of the laws and administration of the Government instead of attempting to oppose me."

Judge Fromentin appealed the controversy to Washington. He wrote to Secretary Adams as follows:

> "The American flag, it is true—the flag of liberty—waves on our forts; a treacherous sign in Florida. Sir, the bohon upas tree of slavery overshadows us. (Ibid., p. 2381.)
>
> "The question now to be decided is not the insignificant and unimportant question of the difficulty between General Jackson and myself. It is a question of country or no country, Constitution or no Constitution, liberty or slavery. The despotism which attacks the liberty of one of the meanest of the inhabitants of this country makes an attack upon the liberty of all. * * * I speak not this now with reference only to the present occasion. But, sir, tyrants beget tyrants. Beware!" (Ibid., p. 2472.)

In spite of this distracted appeal President Monroe and his Secretary of State, John Quincy Adams, sustained Jackson. Their decision was communicated to Judge Fromentin by a letter wherein Secretary Adams says he is directed by the President—

> "To inform you that the laws of the United States relative to the revenue and its collection and those relating to the slave trade having been the only ones extended by act of Congress to the territories of Florida, it was to the execution only of them that your

commission as judge of the United States was considered and intended to apply. *The President thought the authority of Congress alone competent to extend other laws of the United States to newly acquired territory;* nor could he give to the judge a jurisdiction which could only be conferred by them." (Annals of Congress, first session Seventeenth Congress, vol. 2, p. 2411.)

Attention is directed to the fact that in this instance three American statesmen, James Monroe, John Quincy Adams, and Andrew Jackson, each of whom was elected President of the United States, united in declaring officially that the Constitution did not apply of its own force to territory newly acquired by this nation, by virtue of the act of acquisition, but that such extension must be accomplished by the action of Congress.

Texas.—March 1, 1845 (5 Stat., 797), Congress adopted a joint resolution for the annexation of Texas. Subsequently the convention of Texas and the Congress of that Republic adopted a similar resolution. Thereafter Robert J. Walker, Secretary of the Treasury under President Polk, issued the following order:

"TREASURY DEPARTMENT, *July 29, 1845.*

"*To collectors and other officers of the customs:*

"The President of the United States has received official intelligence that the convention, as well as the Congress of the Republic of Texas, have sanctioned and adopted the joint resolution of the Congress of the United States of the 1st of March last for the admission of Texas as a State of the Union.

"By the twenty-fourth section of the act of Congress of the United States of the 30th August, 1842, it is provided: 'That it shall be the duty of all collectors and other officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty shall arise as to the true construction or meaning of any part of such revenue laws the decision of the Secretary of the Treasury shall be conclusive and binding upon all such collectors and other officers of the customs.' In conformity with this provision of the law, it becomes my duty to communicate the views and instructions of this Department upon various important questions arising out of the new relations between Texas and the United States.

"First. Although there is now a solemn compact obligatory upon both parties for the admission of Texas as a State of the Union, yet, until further action of the Congress of the United States upon this subject, and instructions founded thereon from this Department, you will collect duties, as heretofore, upon all the imports from Texas into the United States.

"A similar question arose in relation to exports from Florida into New Orleans in 1819, when it was decided by the Treasury Department 'that all goods which have been, or may be, imported from Pensacola, *before an act of Congress shall be passed erecting it into a collection district,* and authorizing the appointment of an officer to reside thereat, for the purpose of superintending the collection of duties, will be liable to duty.'" (Book T., October 10, 1843, to February 4, 1848, Circulars, Office Secretary of Treasury.)

On December 29, 1845, Congress passed an act, the first section of which was as follows:

> "That all the laws of the United States are hereby declared to extend to and over, and to have full force and effect within, the State of Texas, admitted at the present session of Congress into the Confederacy and Union of the United States." (9th U. S. Stats., p. 1.)

On December 31, 1845, Congress created a collection district, embracing the State of Texas. (9th U. S. Stats., p. 2.)

Oregon.—Territorial government established by act of August 14, 1848. (9 Stat., 323.)

Ordinance of 1787 extended to inhabitants. (Section 14.)

Revenue laws of the United States extended over the Territory. (Section 26.)

Missouri.—Territorial government established June 4, 1812. (2 Stat., 743.)

Section 14 is follows:

> "*And be it further enacted*, That the people of the said Territory shall always be entitled to a proportionate representation in the general assembly; to judicial proceedings according to the common law and the laws and usages in force in the said Territory; to the benefit of the writ of habeas corpus. In all criminal cases the trial shall be by jury of good and lawful men of the vicinage. All persons shall be bailable, unless for capital offenses where the proof shall be evident or the presumption great. All fines shall be moderate, and no cruel or unusual punishment shall be inflicted. No man shall be deprived of his life, liberty, or property but by the judgment of his peers and the law of the land. If the public exigencies make it necessary for the common preservation to take the property of any person, or to demand his particular services, full compensation shall be made for the same. No ex post facto law or law impairing the obligation of contracts shall be made. No law shall be made which shall lay any person under restraint, burthen, or disability on account of his religious opinions, professions, or mode of worship, in all of which he shall be free to maintain his own, and not burthened for those of another. Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be encouraged and provided for from the public lands of the United States in the said Territory in such manner as Congress may deem expedient."

This is substantially the Bill of Rights contained in the ordinance of 1787. This enactment was unnecessary if the Constitution in full vigor extended to Missouri, and is evidence that Congress and President Madison thought it did not.

By the act of April 20, 1836 (5 Stat., 10), establishing a government for the Territory of Wisconsin, the Constitution of the United States was not extended to the Territory, but it was provided in the following language, used for the first time in this legislation for Territories, that—

> "The laws of the United States are hereby extended over and shall be in force in said Territory, so far as the same or any provisions thereof may be applicable."

The same provision was made as to the Territory of Minnesota. (Act of March 3, 1849, 9 Stat., 403.)

The act to establish a Territorial government for New Mexico (1850) contained the following provision:

> "SEC. 17. *And be it further enacted*, That the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within said Territory of New Mexico as elsewhere within the United States." (9 Gen. Stats. of U. S., chap. 49, p. 452.)

Similar legislation has been had in regard to other organized Territories, as follows: Utah, vol. 9, Stat. L., p. 458, chap. 51, sec. 17; Colorado, vol. 12, p. 176, chap. 59, sec. 16; Dakota, vol. 12, p. 244, chap. 86, sec. 16; Idaho, vol. 12, p. 813, chap. 117, sec. 13; Montana, vol. 13, p. 91, chap. 95, sec. 13; Wyoming, vol. 15, p. 183, chap. 235, sec. 16; District of Columbia, vol. 16, p. 426, chap. 62, sec. 34.

Finally, in the "Act to revise and consolidate the statutes of the United States," approved June 22, 1874, Congress made general provisions as follow:

> "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the *organized* Territories, and in every Territory *hereafter organized* as elsewhere in the United States." (Revised Statutes of the United States, sec. 1891.)

The expressions "organized Territories" and "every Territory hereafter organized" appearing in this statute, refers to the political subdivisions known as Territories, in which Territorial governments have been or may be organized. It can not be interpreted to mean unorganized territory considered as an expanse of country, nor can "every Territory hereafter *organized*" be held to mean every foot of land hereafter *acquired*.

The term "organized territory" is used in contradistinction to "unorganized territory," which latter term is applied to Alaska. (See Rev. Stat., title 3, chaps. 2 and 3.)

Alaska.—The Alaska treaty was proclaimed June 20, 1867.

July 27, 1868, was passed an act entitled "An act to extend the laws of the United States relating to customs, commerce, and navigation over the territory ceded to the United States by Russia, to establish a collection district therein, and for other purposes."

The first section of this act extended the laws of the United States relating to customs, commerce, and navigation to and over "all the mainland, islands, and waters of the territory ceded to the United States by the Emperor of Russia," etc.

The Northwest Territory.—The history of the ordinance for the government of the Northwest Territory also proves that the statesmen of that period did not accept the doctrine that the guaranties enjoyed by the inhabitants of the States were possessed by the inhabitants of the Northwest Territory, neither by virtue of the Articles of Confederation nor by the fact that they had theretofore been within the jurisdiction of one of the States. The accepted doctrine was that such guaranties and rights must be conferred by Congress. Hence the ordinance contained "six articles of compact between the original States and the people and States in the said Territory."

The first provided that no peaceable person should "ever be molested on account of his mode of worship or religious sentiments." The second guaranteed to the inhabitants "the benefits of the writ of *habeas corpus*, trial by jury, proportionate representation in the legislature, bail (except for capital offenses), moderate fines and punishments, and the preservation of liberty and property." The article concluded with the declaration "that no law ought ever to be made or have force in the said territory that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide* and without fraud, previously formed." The third article declared "that schools and means of education should forever be encouraged, and good faith should be observed toward the Indians." The fourth declared "that the territory and States formed therein should forever remain a part of the confederacy, subject to the Articles of Confederation and the authority of Congress under them." The fifth provided for the formation in the territory of not less than three nor more than five States, to be admitted "into the Congress of the United States on an equal footing with the original States in all respects whatever, and to be at liberty to form a permanent constitution and State government, republican in form, and in conformity with the Articles of Confederation." The sixth prohibited slavery in the territory, but permitted the capture and return of fugitive slaves from any one of the original States. (Rev. Stat., 1878, pp. 15 and 16.)

In 1783, it being evident that the General Government would eventually become the owner of "The Northwest," Congress appointed a committee to report a plan for connecting said Territory with the Confederation and providing a temporary government for the inhabitants. Thomas Jefferson was chairman of that committee, and on the day the cession from Virginia was accepted he reported a plan for the government of said Territory, which, after being subjected to important modifications, was adopted on April 23, 1784. The plan adopted was known as "Jefferson's ordinance," or the "Ordinance of 1784." The plan proved unsatisfactory and Congress proceeded to legislate anew on the subject. Between May 1, 1786, and July 9, 1787, three ordinances for the government of the Northwest Territory were reported to Congress (May 10, 1786; September 19, 1786; and April 26, 1787). Finally, on July 13, 1787, the ordinance of 1787 was adopted. The convention which formulated our Constitution convened on May 25, 1787, pursuant to a resolution of Congress passed February 21, 1787, and finished its labors September 17, 1787. Therefore Congress was considering the ordinance of 1787 at the very time the convention was deliberating over the Constitution.

Many of the members of Congress who participated in the preparation and passage of the ordinance were serving at the same time as members of the Constitutional Convention.

The internal-revenue laws not universal in application.—Under the Constitution the internal-revenue laws should be as universal and uniform in application as the tariff laws.

The first internal-revenue tax on spirits distilled in the United States was levied by the act of March 3, 1791, which, for purposes of collection, provided "that the United States shall be divided into fourteen districts, each consisting of one State." (1 U. S. Stats., sec. 4, pp. 199, 200.)

Although said act did not prohibit the distilling of spirits except in

compliance with said tax regulations, no provision was made for the collection of said tax in the territories not included in the boundaries of the existing fourteen States.

It was not until 1868 that the internal-revenue laws, as to spirits and tobacco only, were extended to apply to all places "within the exterior boundaries of the United States." (15 U. S. Stats., sec. 107, p. 167.) The territories thus subjected to the provisions of the internal-revenue acts were the Indian reservations and the lands of the civilized tribes, which, theretofore, had not been invaded by the collector of internal-revenue taxes.

Guano Islands (R. S., p. 1080).—In support of the proposition that territory may belong to or be under the jurisdiction of the United States without being a part of the United States, the legislation with relation to guano islands is instructive.

This law provides that any discoverer, being a citizen of the United States, may take peaceable possession of an unoccupied guano island, and, upon giving notice to the Department of State thereof, and the performance of other details, the same shall be considered as appertaining to the United States.

Over such islands are extended the criminal laws regulating offenses or crimes committed on the high seas. The right to possess such islands is confined exclusively to citizens of the United States, and the sale of guano taken therefrom is restricted to such citizens. The right is expressly reserved on the part of the United States to abandon the islands after the guano shall have been removed from the same.

This species of appurtenant territory was recognized by this court in the case of *Jones* v. *United States* (137 U. S., 212).

Over seventy different islands, keys, and groups of islands have thus been taken possession of and made for such special purposes the property of the United States.

2. JUDICIAL PRECEDENT.

The Canter Case.

The first judicial expression on this subject is the opinion of Mr. Justice Johnson, of the United States Supreme Court, sitting in the United States circuit court, in the case of *The American Insurance Company* v. *Canter*, reported in 1 Peters, 517, as an appendix to the report of the case on writ of error to the Supreme Court.

The views of Justice Johnson are clear and distinct and well worthy of careful perusal.

He said:

> "It becomes indispensable to the solution of these difficulties that we should conceive a just idea of the relation in which Florida stands to the United States, and give a correct construction to the second section of the act of Congress of May 26, 1824, respecting the Territorial government of Florida. Correct views on these two subjects will dispose of all the points that have been considered in argument.
>
> "And, first, it is obvious that there is a material distinction between the territory now under consideration and that which is acquired from the aborigines (whether by purchase or conquest), *within* the acknowledged limits of the United States, as also that which is acquired by the establishment of a disputed line. As to

both these there can be no question that the sovereignty of the State or Territory within which it lies, and of the United States, immediately attached, producing a complete subjection to all the laws and institutions of the two governments, local and general, unless modified by treaty.

"The question now to be considered relates to Territories previously subject to the acknowledged jurisdiction of another sovereign; such as was Florida to the Crown of Spain. And on this subject we have the most explicit proof that the understanding of our public functionaries is that the Government and laws of the United States do not extend to such Territory by the mere act of cession. For, in the act of Congress of March 30, 1822, section 9, we have an enumeration of the acts of Congress, which are to be held in force in the Territory; and, in the tenth section an enumeration, in nature of a bill of rights, of privileges, and immunities, *which could not be denied to the inhabitants of the Territory, if they came under the Constitution by the mere act of cession.*

"As, however, the opinion of our public functionaries is not conclusive, we will review the provisions of the Constitution on the subject:

"At the time the Constitution was formed the limits of the territory over which it was to operate were generally defined and recognized. These limits consisted in part of organized States and in part of Territories, the absolute property and dependencies of the United States. These States, this Territory, and future *States* to be admitted into the Union are the sole objects of the Constitution. There is no express provision whatever made in the Constitution for the acquisition or government of Territories beyond those limits.

"The right, therefore, of acquiring territory is altogether incidental to the treaty-making power, and perhaps to the power of admitting new States into the Union; and *the government of such acquisitions is, of course, left to the legislative power of the Union, as far as that power is uncontrolled by treaty.* By the latter we acquire either positively or *sub modo*, and by the former dispose of acquisitions so made; and in case of such acquisitions I see nothing in which the power acquired over the ceded Territories can vary from the power acquired under the law of nations by any other government over acquired or ceded territory."

This was followed by the affirmation of Justice Johnson's decision by the Supreme Court in *The American Insurance Company* v. *Canter* (1 Peters, 511).

This case was decided in the year 1828, the Supreme Court at that time being composed of Marshall, Chief Justice; Washington, Johnson, Duval, Joseph Story, Thompson, and Trimble, associate justices. The case was argued by Mr. Ogden, on one side, and by Mr. Whipple and Daniel Webster, on the other side. The opinion was delivered by Chief Justice Marshall.

Referring to the contention made in the case that the Constitution and laws of the United States are, *per se*, in force in Florida, without any act of legislation by Congress, Mr. Whipple said:

"Much argument has been used in order to show that the Constitution and laws of the United States are, *per se*, in force in Florida, and that the inhabitants are citizens of the United States.

"*How* the Constitution became of force in Florida has not been shown. Was it by the act of cession? Is there any principle in the *law of nations* which upon the act of cession or conquest gives to the ceded or conquered country a right to participate in the privileges of the Constitution of the parent country? The *usages* of nations from the period of Grecian colonization to the present moment are precisely the reverse. Such a right never was asserted.

"The Constitution was established by the people of the United States *for* the United States. It provides for the future admission of Territories into the Union, and expressly confers upon Congress the power of governing them *as Territories* until they are admitted *as States*.

"If the Constitution is in force in Florida, why is it not represented in Congress? Why was it necessary to pass an act of Congress extending several of the laws of the United States to Florida? Why did Congress designate particular laws, such as the crimes act, the slave trade and revenue acts, and introduce them as laws into Florida? Why enumerate particular rights secured to the people of the United States if the inhabitants of Florida were entitled to them upon the act of cession?"

In discussing the relation in which Florida, as ceded territory, stood to the United States prior to its admission as a State of the Union, the Chief Justice said:

"The Constitution confers absolutely on the Government of the Union the powers of making war and of making treaties; consequently that Government possesses the power of acquiring territory, either by conquest or by treaty.

"The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such as its new master shall impose. On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it, and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State.

"On the 2d of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provision: 'That the inhabitants of the territories which his Catholic Majesty ceded to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.'

"This treaty is the law of the land, and admits the inhabitants

of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the Government till Florida shall become a State. In the meantime, Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.'

"Perhaps the power of governing a Territory belonging to the United States which has not, by becoming a State, acquired the means of self-government may result necessarily from the facts that it is not within the jurisdiction of any particular State and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it, Congress, in 1822, passed 'An act for the establishment of a Territorial government in Florida;' and, on the 3d of March, 1823, passed another act to amend the act of 1822. Under this act the Territorial legislature enacted the law now under consideration. * * *

"It has been already stated that all the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the Government of the United States. Congress recognizes this principle by using the words 'laws of the Territory now in force therein.' No laws could then have been in force but those enacted by the Spanish Government.'

By act of March, 1823, eleventh section, Congress declared as to Florida:

"That the laws of the United States, relating to the revenue and its collection, and all other public acts of the United States, not inconsistent or repugnant to this act, shall extend to and have full force and effect in the Territory aforesaid."

Referring to the superior courts of Florida, which were established by act of Congress when Florida was a Territory, the Chief Justice said:

"These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited. They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the Territories of the United States. Although admiralty jurisdiction can be exercised in the States in

those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the Territories. In legislating for them Congress exercises the combined powers of the General and of a State Government."

Fleming v. *Page.*

The case that directly and pointedly confirms the view that under our revenue laws every port is regarded as foreign until expressly brought within those laws by act of Congress is *Fleming* v. *Page.* (9 Howard, 603.)

This case was decided in 1850. It involved the legality of the exaction of duties at the port of Philadelphia on merchandise imported into that port from Tampico, Mexico, in March and June of 1847, when Tampico was in the military occupation of the United States as conquered territory. Daniel Webster was one of the counsel for the prevailing party. In his argument he repeated the views maintained by him and his associate, Mr. Whipple, in the case of *Insurance Company* v. *Canter. Arguendo*, he said that there was a difference between the Territories and other parts of the United States. Judges were there appointed for terms of years, which the Constitution forbade as to other parts of the country; hence the part of the Constitution which directs that duties must be equal in all the ports of the United States does not apply to Territories.

The opinion was delivered by Chief Justice Taney, who held that Tampico was at the time of this shipment a foreign port, although in the possession of the United States. After referring to the measures taken for the establishment of customs duties in the newly conquered territory of Mexico, he said:

"This construction of the revenue laws has been uniformly given by the administrative department of the Government in every case that has come before it. And it has, indeed, been given in cases where there appears to have been stronger ground for regarding the place of shipment as a domestic port; for after Florida had been ceded to the United States, and the forces of the United States had taken possession of Pensacola, it was decided by the Treasury Department that goods imported from Pensacola before an act of Congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty—that is, that although Florida had, by cession, actually become a part of the United States, and was in our possession, yet under our revenue laws, its ports must be regarded as foreign until they were established as domestic by act of Congress; and it appears that this decision was sanctioned at the time by the Attorney-General of the United States, the law officer of the Government. And although not so directly applicable to the case before us, yet the decisions of the Treasury Department in relation to Amelia Island and certain ports in Louisiana, after that province had been ceded to the United States, were both made upon the same grounds. And in the latter case, after a custom-house had been established by law at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other settlements still in the possession of Spain, whether on the Mississippi, Iberville, or the sea-

coast. *The Department in no instance that we are aware of since the establishment of the Government has ever recognized a place in a newly acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by act of Congress.*

"The principle thus adopted and acted upon by the executive department of the Government has been sanctioned by the decisions in this court and the circuit courts whenever the question came before them. We do not propose to comment upon the different cases cited in the argument. It is sufficient to say that there is no discrepancy between them. *And all of them, so far as they apply, maintain that under our revenue laws every port is regarded as a foreign one, unless the custom-house from which the vessel clears is within a collection district established by act of Congress, and the officers granting the clearance exercise their functions under the authority and control of the laws of the United States.*"

The case of Pollard's heirs.

Counsel for Pepke refer to the case of *Pollard's Heirs* v. *Kibbe* (14 Pet.), and cite as the language of the court a paragraph from the opinion of Mr. Justice Baldwin. The opinion of the court was not delivered by Mr. Justice Baldwin, but by Justice Thompson. Justice Baldwin delivered a separate opinion, though concurring in the main opinion of the court.

But since counsel have quoted from Justice Baldwin's opinion a clause which they seem to think proves that the cession of territory to the United States brings it *ipso facto* under the Constitution it may be worth while to point out how mistaken counsel are in their deduction, and that the opinion of Mr. Justice Baldwin, instead of making weight for the argument of the appellant, is really confirmatory of the position of the Government in these cases. The paragraph of Mr. Justice Baldwin's opinion, which immediately precedes that quoted by the counsel on page 16 of their brief, is as follows:

"By the third article of the Louisiana treaty, the United States were bound to protect and maintain the inhabitants of the ceded territory 'in the free enjoyment' of their 'property' until they were incorporated into the Union; and when so incorporated, to admit them 'to the enjoyment of all the rights, advantages, and immunities of citizens of the United States.' *From the moment of such incorporation* the Constitution of the United States, and its amendments, interposed between the inhabitants and the legislative power of the United States the same guarantee which any citizen of any other State had a right to claim for the enjoyment of his property; and every proprietor, alien or citizen, had the same constitutional right to invoke the protection of the judicial power of the State or Union against the invasion of his rights of person or property, wherever he might be located." (2 Peters, 235.)

From this it appears that the Constitution of the United States was not held to interpose between the inhabitants and the legislative power of the United States in the territory ceded by Louisiana in 1783 until the territory had become actually incorporated into the Union as a State.

To show what the learned judge meant when he said in the paragraph quoted by counsel, that the inhabitants became entitled to a threefold protection of the Constitution, the treaty, and the law of nations, I call attention further to his opinion (14 Pet., 417) where he refers to the acts of Congress which applied the ordinance of 1787 to the Territory of Mississippi and the Territory of Orleans. The ordinance of 1787 he declares to have become a part of the Constitution by reason of the sixth article thereof, which says:

> "All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation."

Thus it appears that Mr. Justice Baldwin not only did not refer to the automatic operation of the Constitution in order to raise "this broad panoply" over the rights of the inhabitants of this territory, but he expressly sought for other grounds upon which to consider the Constitution as applicable to them, and found such grounds, first, in the incorporation of the territory into the Union; and secondly, in the extension of the ordinance of 1787 to the territory, that ordinance being, in his opinion, a contract rendered inviolable by the express provision of the Constitution.

Cross v. *Harrison.*

During the war with Mexico, the territory then known as California and New Mexico was conquered and taken possession of by the military forces of the United States, and administered under the law of belligerent right through officers appointed by the President.

In transmitting to Congress copies of the treaty of peace between the United States and Mexico, July 6, 1848, President Polk declared to Congress that "the war with Mexico having terminated, the power of the Executive to establish or to continue temporary civil government over these territories, which existed under the law of nations whilst they were regarded as conquered provinces in our military occupation, has ceased. By their cession to the United States, Mexico has no longer any power over them, and until Congress shall act the inhabitants will be without any organized government. Should they be left in this condition, confusion and anarchy will be likely to prevail."

From this it appears that President Polk and his advisers were of the opinion that military government, rightly assumed and carried on during the continuance of the war, became, *ipso facto*, terminated when a treaty of peace was executed and ratified.

Congress, although thus urgently appealed to by the President, failed to pass any law for the government of California and New Mexico until March 3, 1849, when an act was passed making the port of San Francisco a collection district. On September 9, 1850, an act was passed establishing a Territorial government for New Mexico. On the same day an act was passed admitting the State of California into the Union.

Notwithstanding the opinion of President Polk that the temporary civil governments over these territories, which existed under the law of belligerent right, were terminated by the treaty of peace, these governments were continued in operation by the military and other

officers designated by the President until the admission of California into the Union.

The question of the status of the government of California during the interval between the ratification of the treaty of peace and the extension of the revenue laws of the United States to the port of San Francisco came before the Supreme Court of the United States in 1853, in the case of *Cross* v. *Harrison* (16 Howard, 164).

In that case the court declared that the territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power also to admit new States into this Union, with only such limitations as are expressed in the section in which this power is given. The government, of which the temporary officers designated by the President were the executives, had its origin in the lawful exercise of a belligerent right over a conquered territory. It was instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the Government.

The claim of the plaintiffs (in *Cross* v. *Harrison*) related to:

1. Duties paid by them on goods imported at San Francisco between February 3, 1848 (date of the treaty of peace), and May 30, 1848 (date of exchange of ratifications of treaty).

On this point the court concludes:

> "The plaintiffs therefore can have no right to the return of any moneys paid by them as duties on foreign merchandise in San Francisco up to that date. Until that time California had not been ceded in fact to the United States, but it was a conquered territory, within which the United States were exercising belligerent rights, and whatever sums were received for duties upon foreign merchandises they were paid under them."

2. Duties paid by them on goods imported at San Francisco between May 30, 1848 (date of exchange of ratifications), and the date of notification of the ratification to the military governor (August 7, 1848).

On this point the decision of the court is:

> "But after the ratification of the treaty California became a part of the United States, or a ceded conquered territory. Our inquiry here is to be whether or not the cession gave any right to the plaintiffs to have the duties restored to them which they may have paid between the ratifications and exchange of the treaty and the notification of that fact by our Government to the military governor of California. It was not received by him until two months

after the ratification, and not then with any instructions or even remote intimation from the President that the civil and military government which had been instituted during the war was discontinued. Up to that time, whether such an intimation had or had not been given, duties had been collected under the war tariff, strictly in conformity with the instructions which had been received from Washington.

"It will certainly not be denied that those instructions were binding upon those who administered the civil government in California until they had notice from their own Government that a peace had been finally concluded; or that those who were locally within its jurisdiction, or who had property there, were not bound to comply with those regulations of the government which its functionaries were ordered to execute; or that anyone could claim a right to introduce into the territory of that government foreign merchandise without the payment of duties which had been originally imposed under belligerent rights, because the territory had been ceded by the original possessor and enemy to the conqueror; or that the mere fact of a territory having been ceded by one sovereignty to another opens it to a free commercial intercourse with all the world, as a matter of course, until the new possessor has legislated some terms upon which that may be done. There is no such commercial liberty known among nations, and the attempt to introduce it in this instance is resisted by all of those considerations which have made foreign commerce between nations conventional. "The treaty that gives the right of commerce is the measure and rule of that right." (Vattel, c. 8, par. 93.) The plaintiffs in this case could claim no privilege for the introduction of their goods into San Francisco between the ratifications of the treaty with Mexico and the official annunciation of it to the civil government in California, other than such as that government permitted under the instructions of the Government of the United States.

"We must consider them as having paid the duties upon their importations voluntarily, notwithstanding that they protested against the right of the collector to exact them. Their protest was made from a misconception of the principles applicable to the circumstances under which those duties were claimed, and from their misapprehension of what were the commercial consequences resulting from the treaty of peace with Mexico and the cession of California to the United States. That treaty gave them no right to carry foreign goods there upon which duties had not been paid in one of our ports of entry. The best test of the correctness of what has been said is this: That if such goods had been landed there duty free, they could not have been shipped to any other port in the United States without being liable to pay duty."

3. There then remained the claim for duties paid from August 7, 1848, to the time when the revenue system enacted by Congress for California was put into operation.

On this point, and as a summary of the decision on the whole case, the court say:

"Our conclusion from what has been said is, that the civil government of California, organized as it was from a right of conquest,

did not cease or become defunct in consequence of the signature of the treaty or from its ratification. We think it was continued over a ceded conquest, without any violation of the Constitution or laws of the United States, and that until Congress legislated for it, the duties upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, according to instructions from Washington, from Governor Mason."

Having thus decided the case adversely to the contention of the importers on all points, the court proceeds to discuss the argument of their counsel that the laws of trade remain unchanged in a ceded country until the new sovereign changed them, and this Congress had not done, in which references were made to what was done in North Carolina and Rhode Island and in Louisiana and Florida.

Several considerations are advanced in the opinion as calculated to answer this contention, among them the very obvious and sound and all-sufficient one, that California was a case of conquest, while the others were not.

Among the various suggestions made by the court in opposition to the aforesaid argument of counsel, was the much-quoted dictum:

"By the ratification of the treaty California became a part of the United States. And as there is nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a duty on imposts and tonnage" (p. 197).

Finally the opinion declares:

"But we do not hesitate to say, if the reasons given for our conclusions in this case were not sound, that other considerations would bring us to the same result."

It will be perceived from a study of the case that the tariff law of the United States was not, in that instance, assumed to have been applied, of its own force, to the territory embracing California after the ratification of the treaty. The ratification of the treaty was proclaimed in California August 7, 1848. Up to this time an army officer had been the collector of duties, under a tariff prescribed and laid by the military governor of the Territory. On August 9, 1848, the collector was informed by Lieutenant Halleck, who was the so-called secretary of state of the civil government of California, that he would be relieved as soon as a suitable citizen could be found for his successor. He was also told that the tariff of duties for the collection of military contributions was immediately to cease, and that the revenue laws and tariffs of the United States would be substituted in its place.

It was within the undoubted power of the *de facto* government of California to substitute for the military or war tariff any other system of revenue laws and tariffs which they deemed advisable, and in this instance it appears they did substitute for the war tariff the revenue laws and tariff of the United States. Hence the automatic operation of the tariff laws of the United States was not relied on, but an actual order of substitution was made by the military governor imposing the tariff schedule of the United States as a law upon the Territory.

If the laws of the United States took effect upon California *eo instante* it became American territory, then the delay in notifying the military governor of the exchange of ratifications could not stay their operation. It would, under such a principle, be possible for an Executive to postpone indefinitely the notification of a treaty of cession, and thereby defeat the operation of the Constitution.

Notwithstanding the fact that a portion of the reasoning of the court is opposed to the doctrine of *Insurance Company* v. *Canter* and *Fleming* v. *Page*, the decision, as a decision, is sound, and rightly rests upon the war power continued over a ceded conquest until Congress has legislated for it.

This is the view taken by Halleck. (*Halleck on International Law.*) On page 835 he calls attention to the fact that during the interval of three months which elapsed between the ratification of the treaty of cession of California and its official announcement in California tonnage and import duties were imposed and collected according to the war tariff instead of the tariff of the United States. "If," he says, "the revenue laws extended over California, *eo instante*, on the ratification of the treaty by which that territory was acquired, these duties were unlawfully collected. It was so claimed by those who had paid them, and suit was brought for their recovery. (*Cross* v. *Harrison*, 16 Howard.) This claim of the plaintiffs was distinctly repudiated by the Supreme Court in its opinion."

It seems to have been overlooked that the treaty with Mexico, discussed in *Cross* v. *Harrison*, intended to make, as the court says it did make, the territory in question a part of the United States. This is apparent upon the face of it. Article 4 speaks of Mexicans held as captives by savage tribes "within the limits of the United States, as about to be established by the following article;" and the following article says: "The boundary line between the two Republics shall commence in the Gulf of Mexico * * * thence westwardly along the southern boundary of New Mexico * * * thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean. * * * In order to designate the boundary line with any due precision, upon authoritative maps, and to establish upon the ground land marks which shall show the limits of both Republics." * * * Article 8 speaks of territories previously belonging to Mexico "which remain for the future within the limits of the United States, as defined by the present treaty;" and gives the Mexicans there a right to retain "the title and rights of Mexican citizens, or acquire those of citizens of the United States," their election to be made within one year, those who should remain for a year without having declared their intention to retain the character of Mexicans to "be considered to have elected to become citizens of the United States."

Article 11 several times expresses the same intent as to the new limits of the United States, and, in fact, the whole treaty is but an agreement (and supreme law) arranging the southwestern boundary of the United States, thereby putting into the United States a former part of the territory and citizens of the Republic of Mexico.

IV.

THE CLAUSE OF THE CONSTITUTION WHICH DECLARES THAT DUTIES, IMPOSTS, AND EXCISES SHALL BE UNIFORM THROUGHOUT THE UNITED STATES DOES NOT APPLY TO NOR GOVERN THESE CASES, BECAUSE THE TERM "UNITED STATES," AS THERE USED, MEANS ONLY THE TERRITORY COMPRISED WITHIN THE SEVERAL STATES OF THE UNION, AND WAS INTENDED ONLY FOR THEIR BENEFIT AND PROTECTION, AND NOT FOR THE BENEFIT OR PROTECTION OF OUTSIDE TERRITORY BELONGING TO THE NATION; IN THE LATTER SENSE DUTIES ON IMPORTS FROM THESE ISLANDS ARE UNIFORM THROUGHOUT THE UNITED STATES, BECAUSE THEY ARE UNIFORMLY IMPOSED AT EVERY PORT IN THE UNITED STATES, SO THAT THERE IS NO PREFERENCE GIVEN TO THE PORTS OF ONE STATE OVER THOSE OF ANOTHER, NOR IS ANY INEQUALITY BETWEEN THE SEVERAL STATES CREATED.

PROVISIONS OF THE CONSTITUTION.

Article 1, section 8, of the Constitution is as follows:

> "Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

Other provisions of the Constitution to be considered in association with the foregoing are these:

> "No capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken.
>
> "No tax or duty shall be laid on articles exported from any State.
>
> "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.
>
> "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.
>
> "No State shall, without the consent of Congress, lay any duty of tonnage."

MEANINGS OF THE TERM "UNITED STATES."

This designation is first used in the Declaration of Independence, is continued in the Articles of Confederation, and in the present Constitution.

It has different significations, according to the connection and the sense in which it is used. It may signify:

1. The corporate name of the nation or governmental entity, the same as was provided in the Articles of Confederation, which declared "the stile of this Confederacy shall be the United States of America."

2. The States united—referring to the several States composing the Union.

In this sense, of course, it excludes Territories.

3. The international sense, designating the extent of our domain as a sovereign nation.

In this sense it includes all territory under our dominion wherein no other nation has sovereignty even such as may be under our control by temporary conquest, as Tampico, Mexico, during the Mexican war (*Fleming* v. *Page*); while in a domestic sense it includes geographically the States of the Union and such territory as the President and Senate have by treaties expressly annexed to and made part of the United States, and such as Congress and the President, by act or resolution, have expressly annexed to and made part of the United States, as the Hawaiian Islands.

Under the first head are classed such expressions as:

The Treasury of the United States,
Service of the United States,
Coin of the United States,
Seat of government of the United States,
President of the United States,
Government of the United States,
Office of honor, profit, or trust under the United States,
Office under the authority of the United States,
Credit of the United States.

Under the second head are such expressions as:

We, the people of the United States,
Congress of the United States,
Senate of the United States,
To establish a uniform rule of naturalization and uniform laws on the subject of bankruptcy *throughout the United States*,
Time of choosing electors, etc., to be the same *throughout the United States*,
Duties, imposts, and excises shall be uniform *throughout the United States*.

THE SOURCE OF POLITICAL POWER.

All the authority of the United States is derived from the people of the States. The people of the Territories do not and can not share or contribute to that authority. The people of the States alone elect Congressmen; the States choose Senators and electors. Congress alone, composed of Senators and Representatives from the States, can make laws for the government of the whole nation. No Territorial legislature can possibly be empowered to legislate for any portion of the United States. Government by the people under our system means by the people of the several States. A republican form of government is guaranteed to the States, but not to Territories. Outside the area of the United States considered as a union of States there is no political power, no guaranty of republican government, no pledge against local discriminations by way of port charges, or regulations of commerce, or revenue, or tax on exports; nor any rule of uniformity as to duties, imposts, and excises.

The judicial power of the United States as defined by the Constitution does not extend to territory. Territorial courts are established under the clause which authorizes Congress to make all needful rules and regulations respecting the territory belonging to the United States.

Insurance Co. v. *Canter*, 1 Peters, 511;
Clinton v. *Englebrecht*, 13 Wall., 447.

In *Hepburn* v. *Ellzey* (2 Cranch, 445, 1805), Chief Justice Marshall held that a citizen of the District of Columbia could not maintain an action as a citizen of a State within the meaning of the Constitution against a citizen of Virginia. In support of the jurisdiction Mr. Lee insisted that to give the term State a limited construction would deprive the citizens of the District of general rights of citizens of the United States and put them in a worse condition than aliens. He put the question whether in view of the provision that "No tax or duty shall be laid on articles exported from any State" Congress can lay a tax or duty on articles exported from the District; and also whether Congress can constitutionally give a preference to the ports of the District. The Chief Justice said, page 452:

> "But as the act of Congress obviously uses the word 'State' in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the States contemplated in the Constitution.
>
> "The House of Representatives is to be composed of members chosen by the people of the several States; and each State shall have at least one representative.
>
> "The Senate of the United States shall be composed of two Senators *from* each State.
>
> "Each State shall appoint, for the election of the Executive, a number of electors equal to its whole number of Senators and Representatives.
>
> "These clauses show that the word State is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the law of nations."

In *New Orleans* v. *Winter* (1 Wheaton, 90, 1816) it was held that a citizen of the Mississippi Territory could not sue a citizen of a State. Chief Justice Marshall said, page 93:

> "It has has been attempted to distinguish a *Territory* from the District of Columbia, but the court is of opinion that this distinction can not be maintained. They may differ in many respects, but neither of them is a State in the sense in which that term is used in the Constitution."

In the recent case of *Hooe* v. *Jamieson* (166 U. S., 395), Chief Justice Fuller followed Chief Justice Marshall, saying, page 397:

> "We see no reason for arriving at any other conclusion than that announced by Chief Justice Marshall in *Hepburn* v. *Ellzey* (2 Cranch, 445), February term, 1805, 'that the members of the American confederacy only are the States contemplated in the Constitution;' that the District of Columbia is not a State within the meaning of that instrument; and that the courts of the United States have no jurisdiction of cases between citizens of the District of Columbia and citizens of a State."

THE REASON FOR UNIFORMITY IN DUTIES AND EXCISES.

The reason for requiring uniformity in duties, imposts, and excises among the several States was and is apparent. Historically, it is estab-

lished to have been for the purpose of protecting States from discriminations by Congress which would operate unfairly or injuriously on some States and not equally so on others. This guaranty of uniformity was one of the considerations held out to the States to induce them to accept the new Constitution. It was not a personal but a local guaranty, operating not as a privilege and guard to individuals, but to States considered as organized constituents of the Union.

Hence reasons for applying it to Territories are wanting.

All legislation for Territories being enacted by the Congress chosen by the States, and the Territory being the property of the United States, all the States are equally advantaged by whatever is done toward the regulation of such Territories. They belong to the people of the United States, not to the people of the Territories, and the people of the United States, through their Congress and President, govern them for the equal benefit of all the States.

The imposition of duties on goods imported from Porto Rico is equally applied at all ports of the United States, and goods of all persons, whether citizens of this Union, citizens of Porto Rico, or absolute aliens, are alike subjected to our tariff laws when brought from Porto Rico into the United States. The plaintiffs in error are burdened with no charge which would not be equally exacted of every other person seeking to bring in the same articles from the same place.

Knowlton v. *Moore.*

In the recent case of *Knowlton* v. *Moore*, this court held that the object intended to be provided for by the rule of uniformity imposed upon the power to levy duties, imposts, and excises was the prevention of possible discrimination against one or more of the several States composing the United States. (178 U. S., 41, 89.)

In the opinion in this case the history of this section of the Constitution is minutely traced. The various forms in which the prevailing idea of uniformity between the States was expressed in recommendations to the Continental Congress, and in resolutions introduced therein; in the proceedings of the Constitutional Convention of 1787; and in the interpretation and comments upon this clause made pending the adoption of the Constitution by the several States, were reviewed.

> "The paralysis which the Articles of Confederation produced upon the Continental Congress because of the want of power in that body to enforce necessary taxation to sustain the Government needs no more than statement. And the proceedings of the Congress during the Confederation afford abundant evidence of the constant effort which was made to overcome this situation by attempts to obtain authority from the States for Congress to levy taxes deemed by it essential, and thus relieve it from the embarrassment occasioned by the fact that all demands for revenue depended for fulfillment wholly upon the action of the respective States. Despite the constant agitation as to the subject and the abundant discussions which took place in relation to it during the period of the Confederation, in the whole of the proceedings not a word can be found which can give rise to even the suggestion that there was then any thought of restraining the taxing power with reference to the intrinsic operation of a tax upon individuals. On the contrary, the sole and the only question which

was ever present and in every form was discussed, was the operation of any taxing power which might be granted to Congress upon the respective States; in other words, the discrimination as regards States which might arise from a greater or lesser proportion of any tax being paid within the geographical limits of a particular State." (178 U. S., 95.)

"The proceedings of the Continental Congress also make it clear that the words, 'uniform throughout the United States,' which were afterwards inserted in the Constitution of the United States, had, prior to its adoption, been frequently used, and always with reference purely to a geographical uniformity and as synonymous with the expression, 'to operate generally throughout the United States.'" (Id., 96.)

On March 11, 1783, a vote was taken in Congress upon the following question:

"Shall any taxes, *to operate generally throughout the States*, be recommended by Congress other than duties on foreign commerce?"

A resolution introduced by James Madison in the Virginia house of delegates, in 1784, proposed that delegates from Virginia should be instructed to propose in Congress a recommendation to the States of the Union to authorize that assembly to regulate their trade on principles and under qualifications stated in the following paragraphs:

"'First. That the United States in Congress assembled be authorized to prohibit vessels belonging to any foreign nation from entering any of the ports thereof, or to impose any duties on such vessels and their cargoes which may be judged necessary; all such prohibitions and duties to be *uniform throughout the United States*, and the proceeds of the latter to be carried into the treasury of the State within which they shall accrue.

"'Second. That no State be at liberty to impose duties on any goods, wares or merchandise, imported, by land or by water, from any other State, but may altogether prohibit the importation from any State of any particular species or description of goods, wares or merchandise, of which the importation is at the same time prohibited from all other places whatsoever.'

"It will be noticed that the words 'uniform throughout the United States' are the same which were subsequently adopted in the clause of the Constitution under consideration, and that the term uniformity, in the resolution of Mr. Madison, was applied not only to duties, but to *regulations and prohibitions respecting external commerce*, which were designed to be *the same* all over the Union." (178 U. S., 100.)

On August 25, 1787, the following occurred in the Constitutional Convention (178 U. S., 103):

"Mr. Carroll and Mr. L. Martin expressed their apprehensions, and the probable apprehensions of their constituents, that, under the power of regulating trade, the general legislature might favor the ports of particular States, by requiring vessels destined to or from other States to enter and clear thereat, as vessels belonging or bound to Baltimore to enter and clear at Norfolk, etc. They moved the following proposition:

"'The legislature of the United States shall not oblige vessels belonging to citizens thereof, or to foreigners, to enter or pay

duties or imposts in any other State than in that to which they may be bound, or to clear out in any other than the State in which their cargoes may be laden on board; nor shall any privilege or immunity be granted to any vessel on entering or clearing out, *or paying duties or imposts in one State in preference to another.*'

"On the same day Mr. McHenry and General Pinckney submitted a proposition (which was referred *nem. con.* to a committee) relating to the establishment of new ports in the States for the collection of duties or imposts, which concluded as follows:

"'All duties, imposts, and excises, prohibitions or restraints, laid or made by the legislature of the United States, *shall be uniform and equal* throughout the United States.'

"The fourth section of the seventh article of the proposed constitution reported by the committee on detail on August 6, 1787, read as follows:

"'SEC. 4. No tax or duty shall be laid by the legislature on articles exported from any State, nor on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited.'

"The committee to whom these propositions were referred made a report on August 28, in effect embodying both propositions in one paragraph, as follows:

"'That there be inserted after the fourth clause of the seventh section, "nor shall any regulation of commerce or revenue *give preference to the ports of one State over those of another*, or oblige vessels bound to or from any State to enter, clear, or pay duties in another; and all *tonnage duties, imposts, and excises* laid by the legislature *shall be uniform throughout the United States.*"'

"It will be noticed that the committee recommended not merely that preferences between ports should be forbidden by 'any regulation of commerce,' but also that such preferences should not be made by 'any regulation of *revenue*.' This, obviously, rendered it unnecessary to include in the latter part of the clause, 'prohibitions or restraints,' as proposed by Mr. McHenry and General Pinckney. The substantial effect of the first clause of the paragraph was to require that all regulations of commerce *or of revenue* affecting the commerce through the ports of the States should be the same in all ports.

"It follows from the collocation of the two clauses that the prohibition as to preferences in regulations of commerce between ports and the uniformity as to duties, imposts, and excises, though couched in different language, had absolutely the same significance. The sense in which the word 'uniform' was used is shown by the fact that the committee, whilst adopting in a large measure the proposition of Mr. McHenry and General Pinckney 'that all duties, imposts, excises, prohibitions, or restraints * * * shall be uniform and equal throughout the United States,' struck out the words 'and equal.' Undoubtedly this was done to prevent the implication that taxes should have an equal effect in each State. As we have seen, the pith of the controversy during the Confederation was that even, although the same duty or the same impost or the same excise was laid all over the United States, it might operate unequally by reason of the unequal distribution or existence of the article taxed among the respective States.

"On August 31, 1797, the report of the committee was acted

upon as follows (5 Ell. Deb., 502): The provision 'nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another' was adopted *nem. con.* After discussion the clause 'or oblige vessels bound to or from any State to enter, clear, or pay duties in another' was agreed to. Quoting from the debate at page 503:

"'The word "tonnage" was struck out *nem. con.*, as comprehended in "duties."

"'On the question on the clause of the report, "and all duties, imposts, and excises laid by the legislature shall be uniform throughout the United States," it was agreed to *nem. con.*'

"In a footnote it said:

"'In the printed journal New Hampshire and South Carolina entered in the negative.'

"On September 4, 1787, the committee to whom sundry resolutions, etc., had been referred on August 31, recommended, among others, the following addition and alteration to the report before the convention (pp. 506 to 507):

"'1. The first clause of article 7, section 1, to read as follows: "The legislature shall have power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States."

"'2. At the end of the second clause of article 7, section 1, add "and with the Indian tribes."'

"The committee on style on September 12, 1787, reported a plan of the Constitution (p. 535), the foregoing provision conferring authority to lay taxes, etc., being designated as section 8 of article 1.

"On September 14, 1783, the words 'But all such duties, imposts, and excises shall be uniform throughout the United States,' which, in their adoption had been associated with and formed but a part of the clause forbidding a preference in favor of the port of one State over the port of another State—in other words, had been a part of another clause—were shifted, by a unanimous vote, from that paragraph, and were annexed to the provisions granting the power to tax.

"*Thus, it came to pass that although the provisions as to preference between ports and that regarding uniformity of duties, imposts, and excises were one in purpose, one in their adoption, they became separated only in arranging the Constitution for the purpose of style.*"

Luther Martin, attorney-general of Maryland, in the report made to the legislature of that State, detailing and commenting upon the proceedings of the constitutional convention, of which body Mr. Martin was a member, in the course of comments upon the tax clause of the Constitution, said (178 U. S., 106):

"Though there is a provision that all duties, imposts, and excises shall be uniform—that is, so be laid to the same amount on the same articles in each State—yet this will not prevent Congress from having it in their power to cause them to fall very unequally and much heavier on some States than on others, because these duties may be laid on articles but little or not at all used in some other States and of absolute necessity for use and consumption in others, etc."

In this opinion the court says (178 U. S., 101):

"The question of the undue proportion of taxation which might fall upon one or more States if direct taxation were laid was solved by the principle of apportionment of direct taxes, duties, imposts, and excises which were only subjected to the requirement of uniformity throughout the United States, these words, as we have shown, having acquired at that time an unquestioned meaning."

The authoritative view of the meaning of this clause in a historical sense is summed up in this paragraph (178 U. S., 89):

"That the requirement that direct taxes should be apportioned among the several States contemplated the protection of the States to prevent their being called upon to contribute more than was deemed their due share of the burden is clear. Giving to the term uniformity as applied to duties, imposts, and excises a geographical significance likewise causes that provision to look to the forbidding of discrimination as between the States, by the levying of duties, imposts, or excises upon a particular subject in one State, and a different duty, impost, or excise on the same subject in another; and therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes. And the conclusion that the possible discrimination against one or more States was the only thing intended to be provided for by the rule which uniformity imposed upon the power to levy duties, imposts, and excises is greatly strengthened by considering the state of the law in the mother country and in the colonies, and the practice of taxation which obtained at or about the time of the adoption of the Constitution."

Mr. Monroe, in discussing the clause which provides that all duties, imposts, and excises shall be uniform throughout the United States, says that the object of this provision is to secure a just equality among the States in the exercise of that power by Congress. (2 Messages and Papers of the Presidents, p. 164.)

The Constitution does not require that either direct taxes, or duties, imposts, or excises shall be laid throughout the whole territory belonging to the United States uniformly with the States.

Loughborough v. *Blake* is clear in holding that while Congress can not exempt any State from its due share of the burden of direct taxes, yet this regulation is expressly confined to the States, and creates no necessity for extending the tax to the District or Territories. (5 Wheat., 323.)

The *Cherokee Tobacco Case* is authoritative to the same effect as to internal-revenue taxes. (11 Wall., 616.)

Loughborough v. *Blake.*

The case of *Loughborough* v. *Blake* (5 Wheat., 317), appears to have been scarcely more than a moot case. An examination of the record as filed in the office of the clerk of this court shows that it was an action of replevin brought against the collector of the District of Columbia to recover possession of personal property distrained for taxes. The report in 5 Wheaton states it to have been an action of trespass, which is an error. The case appears to have been conducted by consent on both sides with a view of presenting for decision the

one question which was decided by the judgment of the court. The allegations of the pleadings were probably fictitious. The replevin bond and the writ refer to one black gelding, about nine years old, as the property which had been seized by the collector, while the declaration relates to 10 cows and 10 oxen, indicating that the attorneys had forgotten what particular piece of property they had determined to use for the purposes of the suit. (See *infra*, p. —.)

The pleadings disclose that the tax was levied pursuant to "An act to regulate additional revenue for defraying the expenses of Government and maintaining the public credit by levying a direct tax upon the District of Columbia," passed February 17, 1815; also an act to reduce the amount of the direct taxes, entitled "An act," etc., passed March 5, 1816. It was expressly stipulated in the pleadings that if Congress can constitutionally lay a direct tax upon the lands of the citizens and inhabitants of the District of Columbia, situate within said District, judgment was to be for the Government; otherwise, for the plaintiff. The question was decided in the affirmative. And properly so. The *power* to tax is an ordinary attribute of sovereign government. As intimated in the opinion, if the general language of the Constitution should be confined to the States, still the seventeenth paragraph of the eighth section gives to Congress "exclusive legislation in all cases whatsoever within such District."

The question submitted by the pleading was restricted solely to this: Has Congress authority to impose a direct tax on property in the District of Columbia? And this is what was decided.

The oft-quoted paragraph of the opinion in which the Chief Justice refers to the extent of the Congressional power as reaching to the whole American empire and including the District of Columbia and the territory west of the Missouri, was unnecessary for the decision of the case, and is dictum.

It is also in some respects illogical. For instance, he refers to the grant of power "to lay and collect taxes, duties, imposts, and excises," and also to the modification of this power, "but all duties, imposts, and excises shall be uniform throughout the United States." He then says, "It will not be contended that the modification of the power extended to places to which the power itself did not extend." This is undoubtedly true, but the next conclusion is a non sequitur: "The power, then, to lay and collect duties, imposts, and excises may be exercised and must be exercised throughout the United States," because it might well be that the Government should possess power to levy taxes throughout the whole domain of the United States, including the District and the outlying territories, but that modifications of this power might be confined to portions of the domain. In other words, the modification might very well have less extent than the power, and might very properly refer to the States. And this is undoubtedly the meaning of the modification when considered in a historical sense.

Besides, the construction put by the Chief Justice upon the term "United States" in this connection is inconsistent with the significance attached to it by him in the case of *American Insurance Company* v. *Canter*, where he held that the Territorial courts of Florida were not courts of the United States within the judicial article of the Constitution.

It is probable that when the Chief Justice penned these sentences he was thinking of the United States in a geographical sense, as they

would be considered internationally. He does not attempt to distinguish between the undoubted different meanings attached to the term in different parts of the Constitution, as he did in the Ellzey case.

Nor does he consider the historical meaning of the clause directing that duties, imposts, and excises shall be uniform throughout the United States, as to which, in 1822, President Monroe declared, "The object of this provision is to secure a just equality among the States in the exercise of that power by Congress."

The power of Congress to tax territorial possessions could well be derived from that clause of the Constitution which authorizes it to make all needful rules and regulations for the territory belonging to the United States, and it is unnecessary to refer to the express power in the Constitution to tax the States in order to find authority for territorial taxation.

The declaration that the power to lay and collect duties, etc., may be exercised and must be exercised throughout the United States can not possibly have been intended as a statement that either duties, imposts, excises, or direct taxes must, in order to be constitutional, operate upon the territory as well as the States of the Union; because later on in the same opinion of the Chief Justice he expressly says that taxes may be, but do not need to be, imposed on the Territories as well as on the States.

In *Loughborough* v. *Blake* the court say that the phrase "throughout the United States" means the whole of "the American empire;" that "it is the name given to our great Republic, which is composed of States and Territories;" that accordingly the District of Columbia is within the United States. If the Chief Justice, in assuming this, meant that "the United States" included "all places over which the Government extends" or might in future extend, so that whenever you find a place which is under the jurisdiction of the Government it must be "within the United States," then what he said in 1820 is not true in 1900, for the thirteenth amendment says:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The Chief Justice was too thorough a lawyer to intend more than that, casting one glance toward "the territory west of the Missouri" (not across the far-off Pacific), and finding everywhere an increasing population of citizens of the United States, we could still see there "the United States." Had there been anything to suggest to him to ascend in imagination to a point of view from which an American army occupying the Philippines could be seen, across the then almost untraveled expanse of ocean, he would have remembered at once that while our expansion had been, and seemed likely to be, only upon one of the two lines familiar to our British ancestors, some war or treaty might alter that and start us in the other direction also—that is, toward the acquisition of peopled countries of Asia, Africa, or Oceania.

That taxation and representation ought to and necessarily do go together in government is a political and not a judicial doctrine.

No one understood better than Chief Justice Marshall the full meaning of the complaints which caused our forefathers to set up their independence. But Chief Justice Marshall, in *Loughborough* v. *Blake*,

denied that the power of taxation was limited by the right of representation as a legal principle. He said: "If it were true that, according to the spirit of our Constitution, the power of taxation must be limited by the right of representation, whence is derived the right to lay and collect duties, imposts, and excises within this District? If the principles of liberty and of our Constitution forbid the raising of revenue from those who are not represented, do not these principles forbid the raising of it by duties, imposts, and excises as well as by a direct tax? If the principles of our Revolution give a rule applicable to this case, we can not have forgotten that neither the Stamp Act nor the duty on tea were direct taxes."

The Cherokee Tobacco Case.

In the case of the *Cherokee Tobacco* (11 Wallace, 616), referring to the tax on spirits and tobacco produced in the Indian Territory, Mr. Justice Swayne says: "As regards those articles only, the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessity. Is it unreasonable that this small portion of it shall rest upon these Indians?"

Objection was taken to the validity of this legislation on behalf of the Cherokee Nation, who contended that so far as their nation was concerned, and the lands occupied by it as its reservation, the legislation was in violation of the tenth article of the treaty of 1866 between the United States and the Cherokee Nation. The article of the treaty referred to declared that every Cherokee Indian and every person residing on the Cherokee Nation shall have the right to sell any of the products of his farm, etc., without restraint. It was contended on behalf of the Indians that the act of 1868 was not intended to apply, and did not apply, to the country of the Cherokees, and that the immunities secured by the treaty were in full force there. It was contended by the United States that the act applied with the same effect to the Cherokee country as to any State or other Territory of the United States, and that, to the extent of the provisions of the sections of the treaty, it was annulled.

The court in its opinion conceded that the repugnancy between the act of Congress and the treaty was clear, and that they could not stand together, and decided that the treaty was repealed by the act to the extent of the provisions of the section referred to.

It seems to have been conceded by all the court that although the Cherokee country was within the territorial boundaries of the United States it was competent for the treaty-making power to exempt that country and its inhabitants from the operation of the internal revenue laws, which, under the theory propounded by the plaintiffs in error, are required to be uniform throughout all the territory over which the United States exercises jurisdiction. This case takes direct issue by implication with that theory. It appears to be conceded by all the members of the court, even those who dissented from the judgment of the majority, that it was within the constitutional power of Congress to exempt the Indian country from the operation of these laws. Indeed, Mr. Justice Bradley and Mr. Justice Davis, the dissenting members of the court, were against the legality of the tax upon the express ground that that territory was an exempt jurisdiction and that

it was not the intention of Congress by the act referred to to extend the internal revenue law to the Indian country. Their theory was that the solemn treaty entered into between the United States and the Indian nation involved the good faith of the Government, and the repeal of such a treaty by Congress ought not to be inferred from mere general language such as was used in the act, but ought to be predicated only upon language indicating a clear legislative intent to repeal.

V.

THE CONSTITUTION DOES NOT EXTEND OF ITS OWN FORCE OVER ACQUIRED TERRITORY.

The doctrine of the *ex proprio vigore* extension of the Constitution was never heard of until it was invented and advocated by Calhoun as a means of fastening slavery upon California and New Mexico beyond the power of Congress to disturb or abolish it.

It was in conflict with all previous views of statesmen of all parties, and opposed to the compact in the Ordinance of 1787, as well as to the act of Congress known as the Missouri Compromise.

The doctrine announced in the Dred Scott decision was not original with Chief Justice Taney. It was originated by John C. Calhoun and announced by him during the discussion of the Wilmot proviso in 1847. Regarding its origin Thomas H. Benton says:

> "A new dogma was invented to fit the case—that of the transmigration of the Constitution (the slavery part of it) into the Territories, overriding and overruling all the antislavery laws which it found there, and planting the institution there under its own wing, and maintaining it beyond the power of eradication either by Congress or the people of the Territory. Before this dogma was proclaimed efforts were made to get the Constitution extended to these Territories by act of Congress. Failing in those attempts, the difficulty was leaped over by boldly assuming 'that the Constitution went of itself'—that is to say, the slavery part of it. In this exigency Mr. Calhoun came out with his new and supreme dogma of the transmigratory function of the Constitution in the ipso facto, and the instantaneous transportation of itself in its slavery attributes, into all acquired Territory."

And as to the doctrine itself, Benton says:

> "History can not class higher than as the vagary of a diseased imagination this imputed self-acting and self-extension of the Constitution. The Constitution does nothing of itself—not even in the States, for which it was made. Every part of it requires a law to put it into operation. No part of it can reach a Territory unless imparted to it by act of Congress." (Benton's Thirty Years in the Senate, vol. 2, pp. 713, 714.)

It is true that in expressing his views on the Dred Scott case Chief Justice Taney announced the doctrine that the United States could acquire territory for no other purpose than to convert it into States of the Union, and that all territory acquired by the United States was charged with a trust requiring ultimate admission as a State. The language used by Chief Justice Taney is as follows:

> "There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering

on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. That power is plainly given, and if a new State is admitted it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the State, and the citizens of the State and Federal Government. But no power is given to acquire a territory to be held and governed permanently in that character. * * *

"We do not mean, however, to question the power of Congress in this respect. The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the Departments of the Government it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rest upon the same discretion." (*Dred Scott* v. *Sandford*, 19 How., 393–446, 447.)

Whether the language quoted is mere *dictum*, or was the vital point in that case, is not essential in this investigation for the following reason: That doctrine rests upon the proposition that the authority of the United States to acquire territory is derived solely from the power to create and admit new States, which power is conferred upon Congress by section 3 of article 4 of the Constitution. The Dred Scott case is the only case in which this proposition has ever been accepted. What is popularly supposed to have led to its acceptance in that case is matter of history, not of law. It is sufficient for the purposes of this investigation to call attention to the fact that Chief Justice Taney's major premise was in direct contravention of the doctrines established by the prior decisions of the court and by the course of Congressional action, and has been ignored and completely overthrown by the subsequent decisions of the court, to say nothing of the tremendous results of the civil war.

It is only necessary to refer to Justice Bradley's opinion in the Mormon Church case to see how utterly the doctrine of the Dred Scott case has been tacitly ignored and repudiated.

Subsequent judicial opinions have passed by and over the Dred Scott decision with respectful silence, but the popular and professional estimate of it is probably correctly expressed by Professor Pomeroy, who declares "the substantial portion of this celebrated judgment has rendered the Dred Scott case a byword and a hissing." (Pomeroy's Constitutional Law, sec. 499.)

DEBATE IN SENATE, FEBRUARY, 1849, ON RESOLUTION TO EXTEND THE CONSTITUTION TO CALIFORNIA.

Attempts were made in Congress to pass legislation for the regulation and government of California and New Mexico in the second ses-

sion of the Thirtieth Congress. (See appendix to Congressional Globe, vol. 20, p. 255.)

An amendment to the bill making appropriations for civil and diplomatic expenses of the Government was submitted by Senator Walker, providing that the Constitution of the United States and all and singular the several acts of Congress respecting the registering, etc., of vessels, etc. and the acts respecting the imposing and collection of duties on imports, etc., and all and singular the other acts of Congress of a public and general character, the provisions whereof are suitable and proper to be applied to the territory west of the Rio del Norte, be and the same are hereby extended over and given full force and efficacy in said territory.

To this, Senator Dayton, of New Jersey, proposed an amendment which, in effect, provided that until the end of the first session of the next Congress all the civil, military, and judicial powers exercised by officers of the existing governments of these Territories should be vested in such person or persons, and should be exercised in such manner, as the President should direct for maintaining the inhabitants of said territories in the free enjoyment of their liberty, property, and religion, and the laws of the United States relating to the revenue and its collection shall be extended to said territories, etc.

Upon these two propositions an extensive and interesting debate was held, the real point of dispute between the respective parties arising out of the slavery question. It was claimed, on one hand, that the extension of the Constitution and the laws, as proposed in the amendment of Senator Walker, to these Territories was intended to extend the right of slaveholders to take their slaves into the Territories and have them protected there as property, in the same way that they were under the Constitution protected within the limits of the respective States, and it was this event which the Senators from the antislavery States combated.

The debate gave rise to a discussion as to the relation of the Constitution of the United States to acquired territory, and involved much argument as to whether all or any of the provisions of the Constitution, by their own force, applied to the inhabitants of such territory.

The proposition of Senator Walker was declared by Senator Dayton to be objectionable because, in the first place, it was novel in form; second, because it assumed, in an indirect way, to settle the question of boundary between New Mexico and Texas; in the third place, and more especially, because it assumed to extend, by present enactments, the Constitution of the United States over the Territories of California and New Mexico.

Mr. Dayton asserted that it had been established by decision of the Supreme Court of the United States that the Constitution *proprio vigore* does not extend to or reach the Territories at all. He did not mention the case to which he referred, but in the subsequent course of the debate Senator Berrien, of Georgia, said: "I know the case to which Senators have referred, that of an *American Insurance Company* v. *Canter*.

In further support of his amendment, Senator Dayton said: "I offer to our Southern friends that species of Territory government which has been yielded by the North to the South, to the slave Territories of Florida and Louisiana, and I ask our Southern friends now whether they will not be willing to adopt for a free country the same

species of government which we cheerfully extended to Florida, a slave country."

On a subsequent day, in the course of the same debate, Senator Walker said:

> "Usually, sir, these general laws of the United States have been extended over Territories gradually; that is, when the population of the country became such as to demand the use of the public land, the land laws have been extended; when there was a population which required and justified the services of the Post-Office Department, the post-office laws have been extended; *when it became necessary, from the increasing commerce of the country, to establish ports of entry and extend laws for the collection of revenue, the revenue laws have been extended;* and so on, gradually, step by step, has the exercise of general jurisdiction by the United States been extended in all those respects in which the interests of the country required its exercise.
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> "Again, sir, in regard to the extension of the Constitution, the third objection of the Senator from New Jersey. And for what reason is the Senator from New Jersey opposed to the extension of the Constitution, if it can be done by legislation, over the Territories of California and New Mexico. Why, sir, his argument is that the South claims that the Constitution gives them the right to take their slaves there and make it a slave country. He asks no advantage from the South, he says, nor is he willing to yield any advantage. He is opposed to the extension of the Constitution there because it will give to the South what they claim as an advantage, and will give them, according to their idea, an advantage in political power over the North. He denies, however, at the same time, that any such results can really follow. Sir, my feelings upon the subject of slavery are, perhaps, as well known here as those of any other Senator upon this floor. But, sir, I say before this Senate, and before high Heaven, that I feel myself incapable of entertaining any such feelings as those entertained by the Senator from New Jersey. If the Constitution will extend slavery to the land, then let it go. If by that Constitution slavery is extended, I am willing to stand by that Constitution. I am unwilling to withhold from our Southern brethren any of the rights given to them by that sacred instrument."

In the course of the debate Senator Butler said:

> "But I go further and say that, *proprio vigore*, the moment that Territories are acquired under treaty the provisions of the Constitution of the United States extend to that Territory *to some, though not to the entire, extent of its provisions.* This territory was acquired under treaty, and I say that the provisions of the Constitution, with the qualification of applicability, are now, *proprio vigore*, the fundamental law of California and New Mexico. And when I say that I admit that there may be wanting some machinery of courts and officers to carry out those provisions, but they nevertheless exist as the fundamental law; of that there can be no doubt. And I put the question now whether it would be competent for Congress to make a distinction between the ports of California and the ports of New York and Boston as regards

the enactment of laws relating to the revenue. And I will ask another question, by way of illustrating this matter. Suppose that a war broke out with China, or with Great Britain, or with any other power, and the people that are now in California should give aid to the enemy. Am I to be told that American soil, occupied by American citizens, can be betrayed by surrendering it to the enemy without amounting to the crime of treason against the United States? It may be that there would not be courts there before which the traitors could be arraigned, but would it not be manifestly treason against the United States? Will the Senator from New Jersey undertake to assert that treason could not be committed in those Territories against the United States because the Constitution, *proprio vigore*, could not extend to them? It seems to me that it would be one of those paradoxes arising from a nice and technical view, in opposition to what was obvious and true, which are sometimes put forward to mislead the mind. As Lord Mansfield said of Magna Charta and the Christian religion I may say of our Constitution that it constitutes the fundamental law of the land within all the possessions of the United States. This is a principle which can not be disputed, that our fundamental law must necessarily apply to all our possessions, although, not having courts established, the citizens may not be able to avail themselves of it.

"If a person in California now should be subjected to torture for heresy, or arbitrarily shot down for an offense unknown to the United States or the States of the Union, the rebuking spirit of the Constitution would not only be invoked but its substantial provisions would be enforced for redress. Despotism can not exist on American soil under the provisions of the constitutions of the States of this Union. Will it be pretended that in those Territories arbitrary punishment can be inflicted without law? Why, the whole genius of the common law, as it speaks through Magna Charta, would rebuke any such idea. I know that many difficulties would be thrown in the way, because there are no courts, no tribunals for the trial of offenders. Agencies of the law must be established; but that the fundamental law exists there can be no doubt. I think it exists *proprio vigore*, and I think we can extend it by legislation in the same manner that we can extend the laws of Congress. The Constitution is but the law of the States of this Union, and it is the supreme law; and are we to be told that it is to be controlled in its operation, and can not be extended, whilst the more ordinary revenue law may be extended to any territory that we may acquire? I do not intend to occupy the time of the Senate very long upon this subject, as I am admonished that under present circumstances we should economize time.

"I shall give the preference to the amendment of the Senator from Wisconsin, because it recognizes and asserts what in my opinion is correct, that the provisions of the Constitution should be, if they are not, in force in the Territories."

"Mr. WEBSTER. Let me say that in this general sense there is no such thing as extending the Constitution. The Constitution is extended over the United States and over nothing else. It can not be extended over anything except over the old States and the

new States that shall come in hereafter, when they do come in. There is a want of accuracy of ideas in this respect that is quite remarkable among eminent gentlemen, and especially professional and judicial gentlemen. It seems to be taken for granted that the right of trial by jury, the *habeas corpus*, and every principle designed to protect personal liberty, is extended by force of the Constitution itself over every new Territory. That proposition can not be maintained at all. How do you arrive at it by any reasoning or deduction? It can be only arrived at by the loosest of all possible constructions. It is said this must be so, else the right of the *habeas corpus* would be lost. Undoubtedly these rights must be conferred by law before they can be enjoyed in a Territory.

"Sir, if the hopes of some gentlemen were realized and Cuba were to become a possession of the United States by cession, does anybody suppose that the *habeas corpus* and the trial by jury would be established in it by the mere act of cession? Why more than election laws and the political franchises or popular franchises? Sir, the whole authority of Congress on this subject is embraced in that very short provision that Congress shall have power to make all needful rules and regulations respecting the *territories* of the United States. The word is territories, for it is quite evident that the compromises of the Constitution looked to no new acquisitions to form new territories. But as they have been acquired from time to time, new territories have been regarded as coming under that general provision for making rules for *territories*. We have never had a *territory* governed as the United States are governed. The legislature and the judiciary of territories have always been established by a law of Congress. I do not say that while we sit here to make laws for those territories we are not bound by every one of these great principles which are intended as securities for public liberty. But they do not exist in territories till introduced by the authority of Congress. These principles do not, *proprio vigore*, apply to any one of the territories of the United States, *because that territory, while a territory, does not become a part, and is no part of the United States.*

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"One idea further upon this branch of the subject. The Constitution of the United States extending over the Territories and no other law existing there? Why, I beg to know how any government could proceed, without any other authority existing there than such as is created by the Constitution of the United States? Does the Constitution of the United States settle titles to land? Does it regulate the rights of property? Does it fix the relations of parent and child, guardian and ward? The Constitution of the United States establishes what the gentleman calls a confederation for certain great purposes, leaving all the great mass of laws which is to govern society to derive their existence from State enactments. That is the just view of the state of things under the Constitution. And a State or a Territory that has no law but such as it derives from the Constitution of the United States must be entirely without any State or Territorial government. * * * How did we govern Louisiana before it

was a State? Did the writ of *habeas corpus* exist in Louisiana during its Territorial existence? Or the right to trial by jury? Whoever heard of trial by jury there before the law creating the Territorial government gave the right to trial by jury? No one. * * * Well, I suppose the revenue laws are made in pursuance of its provisions; but, according to the gentleman's reasoning the Constitution extends over the Territories as the supreme law, and no legislation on the subject is necessary. This would be tantamount to saying that the moment territory is attached to the United States, all the laws of the United States, as well as the Constitution of the United States, become the governing will of men's conduct and the rights of property, because they are declared to be the law of the land—the laws of Congress being the supreme law as well as the Constitution of the United States. Sir, this is a course of reasoning that can not be maintained. The Crown of England often makes conquests of territory. Who ever heard it contended that the constitution of England, or the supreme power of Parliament, because it is the law of the land, extended over the territory thus acquired, until made to do so by a special act of Parliament? The whole history of colonial conquest shows entirely the reverse. Until provision is made by act of Parliament for a civil government, the territory is held as a military acquisition. It is subject to the control of Parliament, and Parliament may make all laws that they deem proper and necessary to be made for its government; but until such provision is made, the territory is not under the dominion of English law. And it is exactly upon the same principle that territories coming to belong to the United States by acquisition or by cession, as we have no *jus coloniæ*, remain to be made subject to the operation of our supreme law by an enactment of Congress."

In reply Mr. Calhoun stated the views of the other side:

"Well, then, the proposition that the Constitution does not extend to the Territories is false to that extent. How else does Congress obtain the legislative power over the Territories? And yet the honorable Senator says I assign no reason for it. I assign the strongest reason. If the Constitution does not extend there, you have no right to legislate or to do any act in reference to the Territories.

"Well, as to the next point. The honorable Senator states that he was surprised to hear from a strict constructionist the proposition that the Constitution extends itself to the Territories. I certainly never contended that the Constitution was of itself sufficient for the government of Territories without the intervention of legislative enactments. It requires human agency everywhere; it can not extend itself within the limits of any State, in the sense in which the gentleman speaks of it. It is, nevertheless, the supreme law, in obedience to which and in conformity with which all legislative enactments must be made. And the proposition that the Constitution of the United States extends to the Territories so far as it is applicable to them is so clear a proposition that even the Senator from Massachusetts, with his profound talent, can not disprove it. I will put the case of some of the negative provisions of the Constitution. Congress shall make no law concerning

religion, nor create titles of nobility. Can you establish titles of nobility in California? If not, if all the negative provisions extend to the Territories, why not the positive? I do not think it necessary to dwell any longer upon this point."

Mr. Webster further said:

"Mr. President, it is of importance that we should seek to have clear ideas and correct notions of the question which this amendment of the member from Wisconsin has presented to us, and especially that we should seek to get some conception of what is meant by the proposition, in a law, to 'extend the Constitution of the United States to the Territories.' Why, sir, the thing is utterly impossible. All the legislation in the world, in this general form, could not accomplish it. There is no cause for the operation of the legislative power in such a manner as that. The Constitution—what is it? We extend the Constitution of the United States by law to territory? What is the Constitution of the United States? Is not its very first principle that all within its influence and comprehension shall be represented in the Legislature which it establishes, with not only a right of debate and a right to vote in both Houses of Congress, but a right to partake in the choice of the President and Vice-President? And can we by law extend these rights, or any of them, to a Territory of the United States? Everybody will see that it is altogether impracticable."

Mr. Douglas said:

"I believe we have the power to extend it, in all its parts, over that country. I believe, furthermore, that we have the same power to extend the Constitution over a country that we have to bring a country inside of it. *I believe that the effect of extending the Constitution over it will be to make California a State of this Union, giving them two Senators and a Representative in the Congress of the United States*, and authorizing them to form a constitution and State government as they please. And, believing that, I am in favor of the amendment of the Senator from Wisconsin. It extends the revenue laws thither. It extends the judiciary, the land laws, the Indian laws, and all other general laws of Congress over it. *And by extending the Constitution of the United States over it* as a constitution, in so many words, *it erects it into a State*, with the right of representation in the Union. And I am sorry that the Senator from Massachusettts (Mr. Webster) is not now in his seat to say whether or not that will not be the legal effect of it. It is true that that State would be in a *quasi* condition, inchoate, until it organized a State government, until it elected its legislature, and that legislature elected its Senators; but the moment that be done it will be a State of this Union, with the right of representation here. And it would be a State with all its laws complete."

Senator Berrien said:

"If I were not averse to employ the language of paradox, I would say that those who occupy the opposite sides of this proposition are both right and both wrong—that the Constitution does and does not extend to the Territories. It is certainly true, as

was said by the Senator from Massachusetts, that it does not operate in the Territories *proprio vigore*, as a whole, in its totality. Whether you adopt one mode of considering this instrument or another; whether you describe it as a compact between confederated States or as an act of the people of the States of this Union by which they ordained and established a government, still it is evident that *as a totality it can not operate by its own force in the Territories of the United States*. The great object of the Constitution was the formation of a system of government, and so far as its provisions relate to that object they do not extend to the Territories of the United States. That object we seek to accomplish when, under the authority of the Constitution, we are about to organize a government for these Territories.

"But it was not the sole object of the Constitution to ordain and establish a government for the thirteen States, by whose delegates the Constitution was formed. It was also intended to establish certain great principles by which that government was to be regulated. It contained, moreover, and especially in the amendments, certain principles of public liberty, certain safeguards of individual right, *which are capable of being extended to the Territories of the United States*. When, therefore, it is said that the Constitution does not so extend, the answer is, Yes, that is true; as a whole, it does not operate there; and when, on the other hand, it is said that the Constitution does extend to the Territories, the answer is, Yes, that is also true; there are portions of it which do and must of necessity operate in the Territories of the United States." (Appendix to Congressional Globe, vol. 20, p. 255 et seq.)

It will be observed that Mr. Calhoun, who seems to have differed from Mr. Webster to some extent, nevertheless agreed with him on the main point, for Mr. Calhoun says, "I certainly never contended that the Constitution was of itself sufficient for the government of Territories without the intervention of legislative enactments. It requires human agency everywhere; it can not extend itself within the limits of any State, in the sense in which the gentleman speaks of it. It is, nevertheless, the supreme law, in obedience to which, and in conformity with which, all legislative enactments must be made.

VI.

NONE OF THE DECISIONS RELATIVE TO THE RIGHT OF TRIAL BY JURY IN THE TERRITORIES ESTABLISHES THE CONTENTION THAT SUCH RIGHT EXTENDS TO THE TERRITORIES EXPROPRIO VIGORE.

Webster v. *Reid*, 11 How., 437 (1850), McLean, judge.

The case turned upon the validity of certain judgments rendered in the Territorial courts of Iowa, under an act of the Territorial legislature authorizing certain suits against the owners of "half-breed land" within the Territory. It was provided in the act that trial of these suits should be before the court and not a jury. The Supreme Court held that these judgments were nullities and did not authorize the execution on which the land was sold (p. 460):

"By the seventh article of the amendments of the Constitution it is declared, 'in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be pre-

served.' The organic law of the Territory of Iowa, by express provision and by reference, extended the laws of the United States, including the ordinance of 1787, over the Territory, so far as they are applicable. The act under which the above proceeding was had prohibited the trial by jury in matters of fact on which the suits were founded. In this respect the act was void."

It is to be observed that the court refers expressly to the extension of the laws of the United States, including the ordinance of 1787, over the territory.

Reynolds v. *United States*, 98 U. S., 145 (1878), Waite, C. J.

Conviction in Utah of bigamy under section 5352 Revised Statutes. The assignments of error went to the validity of the jury and of the authority of Congress to prohibit polygamy. The court held that a grand jury of 15, selected in accordance with the Territorial statute, was sufficient, although the United States statute required from 16 to 23.

In considering the objections to the jury, Chief Justice Waite said (p. 154):

"By the Constitution of the United States (amendment 6), the accused was entitled to a trial by an impartial jury."

This was correct, in view of the fact that in 1850 the Constitution and laws of the United States, so far as applicable, were extended to the Territory of Utah.

Callan v. *Wilson*, 127 U. S., 540. (1887) Harlan, J.

Callan was convicted of a conspiracy to boycott, fined $25, and in default sentenced to thirty days' imprisonment. The trial was by a court within the District of Columbia. The Government contended that the constitutional provision respecting a trial by jury does not apply in the District. The court held it does.

It is to be observed that the District of Columbia, before it was set apart under the Constitution, had comprised a part of Maryland and a part of Virginia. The cession of this territory to the United States could not and did not destroy the guaranty which once attached in favor of its inhabitants.

On February 21, 1871 (16 Stats., 419), Congress passed an act giving local self-government to the District of Columbia. At the close of section 34 of the organic act is this provision:

"The Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States."

This of itself was a sufficient reason for the judgment of the court in that case, yet another reason might well have been suggested, i. e., that the District of Columbia having been by express authority of the Constitution organized out of parts of two original States of the Union, its inhabitants originally were entitled to all the rights, privileges, and immunities as citizens; and further, that it is impossible to suppose that it was intended that the very seat of the Government should be less guarded and fortified by constitutional guarantees than other parts of the Union.

The American Publishing Company v. *Fisher*, 166 U. S., 464 (1897), Brewer, J.

Judgment for $20,844.75 on a contract for furnishing stationery

recovered in the Territorial court of Utah after a verdict signed by nine jurors, the Territory law authorizing a verdict when nine or more jurors concur. The Territorial statute was held invalid, but upon the ground that Congress had by the act of September 9, 1850, extended the Constitution and laws of the United States over the Territory, and subsequently expressly enacted that no party should be deprived of the right of trial by jury. The cases of *Webster* v. *Reid* and *Reynolds* v. *United States* are commented upon in support of the following (p. 466):

> "Whether the seventh amendment to the Constitution of the United States, which provides that "in suits at common law where the value in controversy shall exceed $20 the right of trial by jury shall be preserved," operates *ex proprio vigore* to invalidate this statute may be matter of dispute."

A statute of the Territory of Utah provided that in all civil cases a verdict may be rendered on the concurrence of nine or more members of the jury. Held: If this statute was not invalid under the seventh amendment to the Constitution, which was not decided, it was so as violating the provision in the act of September 9, 1850, admitting Utah as a Territory, which provision extended the Constitution and the laws of the United States over and declared them to be in force in the Territory of Utah, so far as the same or any provisions thereof may be applicable. (*American Publishing Company* v. *Fisher*, 166 U. S., 464.)

Thompson v. *Utah* (170 U. S., 343) is authority only to this effect, namely: The provision in the Constitution of the State of Utah providing for the trial of criminal cases, not capital, in courts of general jurisdiction by a jury composed of eight persons is *ex post facto* in its application to felonies committed before the Territory became a State.

In *McAllister* v. *United States* (141 U. S., 174) it was held that the constitutional provision with respect to the tenure of judicial offices did not apply to Territorial judges.

The State may establish one system of law in one portion of its territory and another system in another, provided it does not encroach upon the proper jurisdiction of the United States nor abridge the privileges and immunities of citizens of the United States.

The first section of the fourteenth amendment to the Constitution, which provides that no State shall make or enforce any law which shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. If all persons within the territorial limits of the respective jurisdictions of a State have an equal right, in like cases and under like circumstances, to resort to the courts for redress, the amendment is not violated.

The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States, separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding.

Where part of a State is thickly settled and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions—trial by jury in one, for example, and not in the other.

If a Mexican State should be acquired by treaty and added to an adjoining State, or part of a State, in the United States, and the two should be erected into a new State, it can not be doubted that such new State might allow the Mexican laws and judicature to continue unchanged in one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any fair construction of the fourteenth amendment. It would not be based on any respect of persons or classes, but on municipal considerations alone, and a regard to the welfare of all classes within the particular territory or jurisdiction. (Bradley, J., in *Missouri* v. *Lewis*, 101 U. S., 22.)

The words "due process of law" in the fourteenth amendment of the Constitution of the United States do not necessarily require an indictment by a grand jury in a prosecution by a State for murder. (*Hurtado* v. *California*, 110 U. S., 516.)

A trial by jury in suits at common law pending in the State courts is not a privilege or immunity of national citizenship, which the States are forbidden by the fourteenth amendment to abridge. A State can not deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process according to the law of the land. This process in the States is regulated by the law of the State. (*Walker* v. *Sauvinet*, 92 U. S., 90; *Kennard* v. *Louisiana*, 92 U. S., 480.)

The first ten amendments to the Federal Constitution contain no restrictions on the powers of the States, but were intended to operate solely on the Federal Government. (*Brown* v. *New Jersey*, 175 U. S., 172, and cases there cited.)

Cook v. *United States*, 138 U. S., 157 (1891).

The act of 1889 providing for the trial in the eastern district of Texas of persons charged with crimes committed in "No Man's Land" was sustained. It was held that the sixth amendment has reference only to offenses against the United States committed within a State (p. 181):

> "In respect to that clause of the sixth amendment declaring that the "district shall have been previously ascertained by law," it need only be said that if those words import immunity from prosecution where the district is not ascertained by law before the commission of the offense, or that the accused can only be tried in the district in which the offense was committed (such district having been established before the offense was committed), that amendment has reference only to offenses against the United State committed within a State."

In re Ross, *140 U. S.*, *453* (1891) Field, J.:

Ross was convicted by a consular tribunal in Japan of the crime of murder committed on the American ship *Bullion*, in the harbor of Yokohama, upon an information and without a jury. He was sentenced

to death, but the sentence was commuted to imprisonment for life, and he was confined in the penitentiary at Albany. He sued out a writ of habeas corpus, alleging that since he was tried under American statute for a crime committed on an American ship, he was entitled to be indicted by a grand jury and tried by jury (p. 464).

> "By the Constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused apply only to citizens (and others) within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad."

Respecting the guaranties of indictment and trial by jury:

> "And besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution."

VII.

The Spirit in which the Constitution should be Interpreted.

A practical construction of the Constitution, nearly contemporaneous with its adoption and continued by repeated instances through a long series of years, may always influence, and in doubtful cases should determine, the judicial mind on a question of the interpretation of that instrument. (*Stuart* v. *Laird*, 1 Cranch, 269; *Martin* v. *Hunter*, 1 Wheat., 304; *Cohens* v. *Virginia*, 6 Wheat., 264; *Prigg* v. *Pennsylvania*, 16 Pet., 621; *Cooley* v. *Port Wardens*, 12 How., 315; Curtis, Justice, in *Scott* v. *Sandford*, 19 How., 616; *Burrow-Giles Lith. Co.* v. *Sarony*, 111 U. S., 53, 57; *Field* v. *Clark*, 143 U. S., 691.)

In the latter case the court declares:

> "The practical construction of the Constitution as given by so many acts of Congress and embracing almost the entire period of our national existence should not be overruled unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land."

In the case of *Lithographic Company* v. *Sarony* (111 U. S., 57), Justice Miller said:

> "The construction placed upon the Constitution by the first act of 1790 and the act of 1802 by the men who were contemporary with its formation, many of whom were members of the Convention that framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive."

In the Senate, and voting with the Administration party on the Louisiana treaty and legislation relating thereto, were Jonathan Day-

ton, of New Jersey; Pierce Butler, of South Carolina, and Abram Baldwin, of Georgia, all three of them members of the Convention that framed the Constitution. Jefferson was President and Madison Secretary of State. Alexander Hamilton and Gouverneur Morris were still living and commended the purchase.

Justice Story, in *Martin* v. *Hunter's Lessee* (1 Wheat., 326), discussing the principle of construction to be applied to our Constitution, expressed himself thus:

> "The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which at the present might seem salutary might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers as its own wisdom and the public interests should require."

Chief Justice Marshall, in *Cohens* v. *Virginia*, declared that our Constitution was framed for ages to come, and designed to approach immortality as nearly as human institutions can approach it.

In *Holden* v. *Hardy* (169 U. S., 366, 385), Mr. Justice Brown, speaking as to a case claimed to arise under the fourteenth amendment of the Federal Constitution, declared:

> "This court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the States methods of procedure which at the time the Constitution was adopted were deemed essential to the protection and safety of the people or to the liberty of the citizen have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests.
>
> "Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that from the day Magna Charta was signed to the present moment amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society.
>
> "In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these,

or to substitute for a system, which represented the growth of generations of inhabitants a jurisprudence with which they had had no previous acquaintance or sympathy."

In so far as any fugitive expressions in former opinions of this court may seem to conflict with the position maintained by the Attorney-General on behalf of the United States in these cases, they are to be weighed and valued only in accordance with the wise and just rule of interpretation formulated by Chief Justice Marshall in *Cohens* v. *Virginia*:

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which these expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for judgment. The reason for this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing upon all other cases is seldom completely investigated."

In the case of *Genesee Chief* the ancient rule which confined the maritime and admiralty jurisdiction of the United States to tidal waters was departed from, on the express ground that the great importance of the question, in view of the later growth and expansion of the country, was not appreciated or understood, Chief Justice Taney saying:

> "It is the decision in the case of the *Thomas Jefferson* which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that if we follow it we will follow an erroneous decision into which the court fell when the great importance of the question, as it now presents itself, could not have been foreseen, and that the subject, therefore, did not receive the deliberate consideration which at this time would have been given it by the eminent men who presided here when the commerce on the rivers of the West and on the lakes was in its infancy and of little importance and but little regarded compared with that of the present day." (12 How., 443.)

It is submitted that the judgments in these cases violate no constitutional or other right, and ought to be affirmed.

JOHN W. GRIGGS,
Attorney-General.

APPENDIX.

PROTOCOL OF AGREEMENT BETWEEN THE UNITED STATES AND SPAIN, EMBODYING THE TERMS OF A BASIS FOR THE ESTABLISHMENT OF PEACE BETWEEN THE TWO COUNTRIES.

[Signed at Washington, August 12, 1898.]

PROTOCOL.

William R. Day, Secretary of State of the United States, and His Excellency Jules Cambon, Ambassador Extraordinary and Plenipotentiary of the Republic of France at Washington, respectively possessing for this purpose full authority from the Government of the United States and the Government of Spain, have concluded and signed the following articles, embodying the terms on which the two Governments have agreed in respect to the matters hereinafter set forth, having in view the establishment of peace between the two countries, that is to say:

ARTICLE I.

Spain will relinquish all claim of sovereignty over and title to Cuba.

ARTICLE II.

Spain will cede to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also an island in the Ladrones to be selected by the United States.

ARTICLE III.

The United States will occupy and hold the city, bay and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition and government of the Philippines.

ARTICLE IV.

Spain will immediately evacuate Cuba, Porto Rico and other islands now under Spanish sovereignty in the West Indies; and to this end each Government will, within ten days after the signing of this protocol, appoint Commissioners, and the Commissioners so appointed shall, within thirty days after the signing of this protocol, meet at Havana for the purpose of arranging and carrying out the details of the aforesaid evacuation of Cuba and the adjacent Spanish islands; and each Government will, within ten days after the signing of this protocol, also appoint other Commissioners, who shall, within thirty days after the signing of this protocol, meet at San Juan, in Porto Rico, for the purpose of arranging and carrying out the details of the aforesaid evacuation of Porto-Rico and other islands now under Spanish sovereignty in the West Indies.

ARTICLE V.

The United States and Spain will each appoint not more than five commissioners to treat of peace, and the commissioners so appointed shall meet at Paris not later than October 1, 1898, and proceed to the

negotiation and conclusion of a treaty of peace, which treaty shall be subject to ratification according to the respective constitutional forms of the two countries.

ARTICLE VI.

Upon the conclusion and signing of this protocol, hostilities between the two countries shall be suspended, and notice to that effect shall be given as soon as possible by each Government to the commanders of its military and naval forces.

Done at Washington in duplicate, in English and in French, by the Undersigned, who have hereunto set their hands and seals, the 12th day of August 1898.

[SEAL.] WILLIAM R. DAY
[SEAL.] JULES CAMBON

TREATY OF PEACE BETWEEN THE UNITED STATES OF AMERICA AND THE KINGDOM OF SPAIN.

Signed at Paris, December 10, 1898.
Ratification advised by the Senate, February 6, 1899.
Ratified by the President, February 6, 1899.
Ratified by Her Majesty the Queen Regent of Spain, March 19, 1899.
Ratifications exchanged at Washington, April 11, 1899.
Proclaimed, Washington, April 11, 1899.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas, a Treaty of Peace between the United States of America and Her Majesty the Queen Regent of Spain, in the name of her August Son, Don Alfonso XIII, was concluded and signed by their respective plenipotentiaries at Paris on the tenth day of December, 1898, the original of which Convention being in the English and Spanish languages, is word for word as follows:

The United States of America and Her Majesty the Queen Regent of Spain, in the name of her August Son Don Alfonso XIII, desiring to end the state of war now existing between the two countries, have for that purpose appointed as Plenipotentiaries:

The President of the United States,

William R. Day, Cushman K. Davis, William P. Frye, George Gray, and Whitelaw Reid, citizens of the United States;

and Her Majesty the Queen Regent of Spain,

Don Eugenio Montero Ríos, President of the Senate,

Don Buenaventura de Abarzuza, Senator of the Kingdom and ex-Minister of the Crown,

Don José de Garnica, Deputy to the Cortes and Associate Justice of the Supreme Court;

Don Wenceslao Ramirez de Villa-Urrutia, Envoy Extraordinary and Minister Plenipotentiary at Brussels, and

Don Rafael Cerero, General of Division;

Who, having assembled in Paris, and having exchanged their full powers, which were found to be in due and proper form, have, after

discussion of the matters before them, agreed upon the following articles:

ARTICLE I.

Spain relinquishes all claim of sovereignty over and title to Cuba.

And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

ARTICLE II.

Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.

ARTICLE III.

Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line:

A line running from west to east along or near the twentieth parallel of north latitude, and through the middle of the navigable channel of Bachi, from the one hundred and eighteenth (118th) to the one hundred and twenty seventh (127th) degree meridian of longitude east of Greenwich, thence along the one hundred and twenty seventh (127th) degree meridian of longitude east of Greenwich to the parallel of four degrees and forty five minutes (4° 45′) north latitude, thence along the parallel of four degrees and forty five minutes (4° 45′) north latitude to its intersection with the meridian of longitude one hundred and nineteen degrees and thirty five minutes (119° 35′) east of Greenwich, thence along the meridian of longitude one hundred and nineteen degrees and thirty five minutes (119° 35′) east of Greenwich to the parallel of latitude seven degrees and forty minutes (7° 40′) north, thence along the parallel of latitude seven degrees and forty minutes (7° 40′) north to its intersection with the one hundred and sixteenth (116th) degree meridian of longitude east of Greenwich, thence by a direct line to the intersection of the tenth (10th) degree parallel of north latitude with the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich, and thence along the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich to the point of beginning.

The United States will pay to Spain the sum of twenty million dollars ($20,000,000) within three months after the exchange of the ratifications of the present treaty.

ARTICLE IV.

The United States will, for the term of ten years from the date of the exchange of the ratifications of the present treaty, admit Spanish ships and merchandise to the ports of the Philippine Islands on the same terms as ships and merchandise of the United States.

ARTICLE V.

The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as

prisoners of war on the capture of Manila by the American forces. The arms of the soldiers in question shall be restored to them.

Spain will, upon the exchange of the ratifications of the present treaty, proceed to evacuate the Philippines, as well as the island of Guam, on terms similar to those agreed upon by the Commissioners appointed to arrange for the evacuation of Porto Rico and other islands in the West Indies, under the Protocol of August 12, 1898, which is to continue in force till its provisions are completely executed.

The time within which the evacuation of the Philippine Islands and Guam shall be completed shall be fixed by the two Governments. Stands of colors, uncaptured war vessels, small arms, guns of all calibres, with their carriages and accessories, powder, ammunition, livestock, and materials and supplies of all kinds, belonging to the land and naval forces of Spain in the Philippines and Guam, remain the property of Spain. Pieces of heavy ordnance, exclusive of field artillery, in the fortifications and coast defences, shall remain in their emplacements for the term of six months, to be reckoned from the exchange of ratifications of the treaty; and the United States may, in the mean time, purchase such material from Spain, if a satisfactory agreement between the two Governments on the subject shall be reached.

ARTICLE VI.

Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offences, in connection with the insurrections in Cuba and the Philippines and the war with the United States.

Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

The Government of the United States will at its own cost return to Spain and the Government of Spain will at its own cost return to the United States, Cuba, Porto-Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article.

ARTICLE VII.

The United States and Spain mutually relinquish all claims for indemnity, national and individual of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

ARTICLE VIII.

In conformity with the provisions of Articles I, II, and III of this treaty, Spain relinquishes in Cuba, and cedes in Porto Rico and other islands in the West Indies, in the island of Guam, and in the Philippine Archipelago, all the buildings, wharves, barracks, forts, structures,

public highways and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the Crown of Spain.

And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be.

The aforesaid relinquishment or cession, as the case may be, includes all documents exclusively referring to the sovereignty relinquished or ceded that may exist in the archives of the Peninsula. Where any document in such archives only in part relates to said sovereignty, a copy of such part will be furnished whenever it shall be requested. Like rules shall be reciprocally observed in favor of Spain in respect of documents in the archives of the islands above referred to.

In the aforesaid relinquishment or cession, as the case may be, are also included such rights as the Crown of Spain and its authorities possess in respect of the official archives and records, executive as well as judicial, in the islands above referred to, which relate to said islands or the rights and property of their inhabitants. Such archives and records shall be carefully preserved, and private persons shall without distinction have the right to require, in accordance with law, authenticated copies of the contracts, wills and other instruments forming part of notarial protocols or files, or which may be contained in the executive or judicial archives, be the latter in Spain or in the islands aforesaid.

ARTICLE IX.

Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

ARTICLE X.

The inhabitants of the territories over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of their religion.

ARTICLE XI.

The Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignty shall be subject in matters civil as well as criminal to the jurisdiction of the courts of the country wherein they reside, pursuant to the ordinary laws governing the same; and they shall have the right to appear before such courts, and to pursue the same course as citizens of the country to which the courts belong.

ARTICLE XII.

Judicial proceedings pending at the time of the exchange of ratifications of this treaty in the territories over which Spain relinquishes or cedes her sovereignty shall be determined according to the following rules:

1. Judgments rendered either in civil suits between private individuals, or in criminal matters, before the date mentioned, and with respect to which there is no recourse or right of review under the Spanish law, shall be deemed to be final, and shall be executed in due form by competent authority in the territory within which such judgments should be carried out.

2. Civil suits between private individuals which may on the date mentioned be undetermined shall be prosecuted to judgment before the court in which they may then be pending or in the court that may be substituted therefor.

3. Criminal actions pending on the date mentioned before the Supreme Court of Spain against citizens of the territory which by this treaty ceases to be Spanish shall continue under its jurisdiction until final judgment; but, such judgment having been rendered, the execution thereof shall be committed to the competent authority of the place in which the case arose.

ARTICLE XIII.

The rights of property secured by copyrights and patents acquired by Spaniards in the Island of Cuba, and in Porto Rico, the Philippines and other ceded territories, at the time of the exchange of the ratifications of this treaty, shall continue to be respected. Spanish scientific, literary and artistic works, not subversive of public order in the territories in question, shall continue to be admitted free of duty into such territories, for the period of ten years, to be reckoned from the date of the exchange of the ratification of this treaty.

ARTICLE XIV.

Spain shall have the power to establish consular officers in the ports and places of the territories, the sovereignty over which has been either relinquished or ceded by the present treaty.

ARTICLE XV.

The Government of each country will, for the term of ten years, accord to the merchant vessels of the other country the same treatment in respect of all port charges, including entrance and clearance

dues, light dues, and tonnage duties, as it accords to its own merchant vessels, not engaged in the coastwise trade.

This article may at any time be terminated on six months' notice given by either Government to the other.

ARTICLE XVI.

It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will upon the termination of such occupancy, advise any Government established in the island to assume the same obligations.

ARTICLE XVII.

The present treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by Her Majesty the Queen Regent of Spain; and the ratifications shall be exchanged at Washington within six months from the date hereof, or earlier if possible.

In faith whereof, we, the respective Plenipotentiaries, have signed this treaty and have hereunto affixed our seals.

Done in duplicate at Paris, the tenth day of December, in the year of Our Lord one thousand eight hundred and ninety eight.

[SEAL] WILLIAM R. DAY.
[SEAL] CUSHMAN K. DAVIS.
[SEAL] WM. P. FRYE.
[SEAL] GEO. GRAY.
[SEAL] WHITELAW REID.

TREATIES.

The treaty with France of April 30, 1803, by which Louisiana was ceded to the United States, contains an article declaring:

> "That the inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all rights, advantages, and immunities of citizens of the United States, and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

The treaty with Spain of February 22, 1819, by which the Floridas were ceded to the United States, contains the following clause:

> "The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States."

The treaty of February 2, 1848, with Mexico, which ceded to the United States New Mexico and California, contains the following:

> "Mexicans who in the territory aforesaid shall not preserve the character of citizens of the Mexican Republic, conformably with

what is stipulated in the preceding article, shall be incorporated into the Union of the United States and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution, and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property and secured in the free exercise of their religion without restriction."

The treaty of Paris of December 10, 1898, by which Porto Rico and other islands were ceded to the United States, provides:

"ARTICLE 9. The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress.

"ARTICLE 10. The inhabitants of the territories over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of their religion."

The treaty of March 30, 1867, with Russia, by which Alaska was ceded to the United States, contains the following:

"ARTICLE 3. The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country.

COPY OF THE RECORD IN LOUGHBOROUGH *v.* BLAKE.

DISTRICT OF COLUMBIA, *to wit:*

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the fourth Monday of December, being the twenty-second day of the same month, in the year of our Lord eighteen hundred and seventeen and of the independence of the United States the forty-second.

Present: The Hon'ble William Cranch, esq., chief judge; Buckner Thruston and James Morsell, esqs., asst. judges; Washington Boyd, esquire, marshal; William Brent, clk.

In the record of proceedings of the same court among other is the following, to wit:

NATHAN LUFBOROUGH
against
JAMES H. BLAKE.

Be it remembered that heretofore, to wit, on the tenth day of September, in the year of our Lord eighteen hundred and seventeen, the said Nathan Lufborough, by Elias B. Caldwell and Henry Carroll, esquire, his attorneys, filed in the circuit court here for the district and county aforesaid a certain writing obligatory, commonly called a

replevin bond, and which is in manner and form and of the tenor following, to wit: "Know all men by these presents that we, Nathan Lufborough and Lewis Grant Davidson, all of Washington County, in the District of Columbia, are held and firmly bound unto James H. Blake in the just and full sum of one hundred and fifty dollars, current money of the United States, to be paid unto the said ——— ———, his certain attorney, executor, administrators, and assigns, to which payment well and truly to be made and done we bind ourselves and each of us, our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals and dated this eighth day of September, A. D. 1817.

Whereas the above-bound N. Lufborough is about to prosecute and sue forth out of the circuit court of the District of Columbia for the county of Washington a certain writ of the United States replevying, to be directed to the marshal of the District of Columbia, commanding him to replevy the following goods and chattles, to wit: *One black gelding about nine years old*, the property of the said Lufborough, which a certain James H. Blake, collector of the United States taxes, hath taken and unjustly detains, as it is said against sureties, pledges, and so forth, which said writ of replevin is returnable to the next circuit court of the District of Columbia for the county of Washington. Now, the condition of the above obligation is such that if the said Nathan Lufborough do and shall well and truly prosecute with effect the said writ of replevin against the said James H. Blake for the taking of the said goods and chattles as aforesaid, and shall well and truly return and redeliver the said goods to the said James H. Blake if a return thereof shall be adjudged by the said circuit court, and shall pay and satisfy unto the said James H. Blake, or his successor or successors in office, as shall be adjudged by the said circuit court, or which shall be sustained by occasion of the replevying the aforesaid property, and shall in all things well and truly observe and perform the judgment of the said circuit court of and upon the premises, then the above obligation to be void, else to remain in full force and virtue in law.

NATHAN LUFBOROUGH. [SEAL.]
LEWIS G. DAVIDSON. [SEAL.]
———. [SEAL.]

Signed, sealed, and delivered in the presence of—
CHARLES C. JONES.

Accompanying the aforegoing bond was the following authority, agreeable to law:

To William Brent, esquire, clerk of the circuit court for Washington County, in the District of Columbia: You are hereby authorized and directed to issue, in behalf of Nathan Lufborough, an inhabitant of this District, a writ of replevin for *one black gelding*, taken in execution by the collector of the United States direct tax for the said District, for direct taxes alleged by him to be due from the said Lufborough to the U. States, but which he (the said Lufborough) contends he is not constitutionally bound to pay, he having stated in writing his objections to the payment of the said tax and sworn to the said statement, as the law directs, in this behalf. Given under my hand and seal the day and year first above written.

JOHN THRELKELD. [SEAL.]

Thereupon, on the day and year aforesaid, the said Nathan Lufborough, by his attorney aforesaid, ———, prosecuted and sued forth out of the circuit court here for the District and county aforesaid the writ of the United States of replevin directed to the marshal of the District aforesaid in the words and of the tenor following, to wit: "District of Columbia, to wit: The United States of America to the marshal of the District of Columbia, greeting: Whereas Nathan Lufborough, of the county of Washington, hath come into the circuit court of the District of Columbia for the county aforesaid and found sufficient sureties as well his clamor to prosecute as for *one black gelding about nine years old*, the proper goods and chattels of him the said Nathan Lufborough which a certain James H. Blake, of the county aforesaid, hath taken and unjustly detains against sureties and pledges, &c. (as it is said), to be returned if the return thereof shall be adjudged: You are, therefore, hereby commanded that the said goods and chattels, being in the county aforesaid, in your said district, you cause to be replevied and delivered to the said Nathan Lufborough, and that you put by sureties and safe pledges the said James H. Blake that he be and appear before the said circuit court to be held in and for the county aforesaid, at the city of Washington, on the fourth Monday of December next, to answer the said Nathan Lufborough in a plea wherefore he took the goods and chattels of him, the said Lufborough, and them unjustly detains against gages and pledges, &c., and how you shall execute this writ make known to the said court at the day and place aforesaid, and have you then and there this writ. Witness the Honorable William Cranch, esq., chief judge of the said court, the 14th day of June, 1817.

WM. BRENT, *Clk.*

Issued this tenth day of Sept., 1817.

And now at this day, to wit, the fourth Monday of December, being the twenty-second day of the same month, in the year of our Lord eighteen hundred and seventeen, and the day of the return of the aforegoing writ, come into the circuit court here for the District and county afsd. the said Nathan Lufborough, by his attorneys aforesaid and the marshal of the District aforesaid, to whom the said aforegoing writ was in form aforesaid directed, makes returns thereof to the court here, thus endorsed, to wit:

Replevied and delivered to the plaintiff.

W. BOYD, *Marshal, Dt. Col'a.*

And the said Nathan Lufborough, by his attorney aforesaid, declared against the said James H. Blake in the plea aforesaid in form following, to wit, "District of Columbia, Washington County, Sct.: James H. Blake, late of Washington County, gentleman, was summoned to answer unto Nathan Lufborough in a plea wherefore he took the cattle of the said Nathan Lufborough & unjustly detained them against sureties & pledges, &c. And whereupon the said Nathan, by Elias B. Caldwell, his attorney, complains that the said James, on the first day of September, in the year of our Lord one thousand eight hundred and seventeen, at Washington County aforesaid, in a certain farm of the said Nathan there took the cattle of the said Nathan, to wit, *ten cows and ten oxen* and unjustly detained them against sureties and pledges until, &c. Wherefore the said Nathan says that he is injured and has sustained damage to the value of one thousand dollars, and therefore he brings his suit, &c.

E. B. CALDWELL, *Atto. for the Plff.*

NATHAN LUFBOROUGH *vs.* JAMES H. BLAKE. } 369 appearance. Replevin nar pleas property in def't, with leave to give the special matter in evidence and issue.

The defendant justified the taking *the cattle* mentioned in the declaration for taxes due to the United States for the year 1815 under an act of the Congress of the United States passed the 27th day of February, A. D. 1815, entitled "An act to provide additional revenue for defraying the expenses of government and maintaining the public credit by laying a direct tax upon the District of Columbia," and under an act passed the fifth day of March, A. D. 1816, entitled "An act to reduce the amount of the direct tax, entitled "An act——." It is admitted that the plaintiff was a resident of the District of Columbia and held real estate in the county of Washington, in the said District of Columbia, which real estate was assessed for taxes to the United States under the above-mentioned acts of Congress, and the said taxes not having been paid, and such notice and demand thereof having been given and made, as is required by said laws, *the cattle* in the declaration mentioned were distrained for the payment of the said tax. It is admitted that the defendant, James H. Blake, is the collector of the said taxes under the said laws, and that if Congress may constitutionally lay a direct tax upon the lands of citizens and inhabitants of the District of Columbia situate within the said District judgment in this case shall be entered for the defendant, and one cent damages in due form otherwise for the plff. and for such damages as shall be assessed by a jury, &c.

Whereupon all and singular the premises being seen and inspected by the court here, and mature deliberation being thereupon had, it is considered by said court that the said James H. Blake recover of the said Nathan Lufborough one cent current money damages as also the sum of ——— by the court here unto the said James H. Blake on his assent adjudged for his costs and charges by him about his defence in this behalf laid out and expended, and the said Nathan Lufborough in mercy, &c.

Test: WM. BRENT, *Clk.*

And thereupon the said Nathan Lufborough by his attorney aforesaid prays an appeal from the judgment aforesaid so as aforesaid rendered to the Supreme Court of the United States, and it is granted him.

DISTRICT OF COLUMBIA, *Washington County, sct:*

I, William Brent, clerk of the circuit court of the United States for the District of Columbia and county of Washington, hereby certify that the aforegoing is truly copied from the record of the proceedings of the county aforesaid in the above-mentioned suit, wherein Nathan Lufborough is plaintiff and James H. Blake is defendant. In testimony whereof I hereto set my hand and affix the seal of the said court this twelfth day of February, A. D. 1818.

[SEAL.] WM. BRENT, *Clk.*

UNITED STATES, *ss:*

The President of the United States to the judges of the circuit court of the United States for the District of Columbia, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you or

some of you, between Nathan Lufborough, plaintiff, and James H. Blake, defendant, a manifest error hath happened to the great damage of the said Nathan Lufborough as by his complaint appears. We being willing that error if any hath been should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of February next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable John Marshall, esq., Chief Justice of the said Supreme Court, this —— day of ——— in the year of our Lord one thousand eight hundred and ——— and of the Independence of the United States the ———.

[SEAL OF SUP. CT. UNITED STATES.]

E. B. CALDWELL,
Clk. Sup. Ct. U. S.

(Endorsed:) 21 Washington. Nathan Lufborough vs. James H. Blake. Record. Filed Feb. 17th, 1818. D. Columbia. Decided 1820.